



June 1, 1999

Mr. Robert A. Schulman
Schwartz & Eichelbaum, P.C.
700 N. St. Mary's Street, Suite 1850
San Antonio, Texas 78205

OR99-1511

Dear Mr. Schulman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124639.

The Alamo Heights Independent School District (the "school district"), which you represent, received a request for information pertaining to the school district's 1999 construction projects, including bid proposals. You contend that the contractors' bid proposals are excepted from public disclosure under sections 552.101, 552.104, 552.110, and 552.127 of the Government Code. We assume that you have released all other requested information. You have submitted the requested bidding information for our review.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that the bidding information is confidential under section 44.035(b) of the Education Code. Section 44.035(b) provides that

[a] school district using competitive sealed proposals may discuss proposals with offerors after proposals have been opened to allow for clarification and changes. The district shall take adequate precautions to ensure that information from competing proposals is not disclosed to other offerors.

As a general rule, the statutory confidentiality protected by section 552.101 requires express language making certain information confidential or stating that information shall not be released to the public. Open Records Decision No. 478 (1987). By its plain language, section 44.035(b) does not expressly make bid proposals confidential. Section 44.035(b) only requires a school district to take adequate precautions to protect bid proposals from competing bidders. The school district has taken the necessary precautions by withholding the information and requesting an open records ruling from this office. Accordingly, we find that the bidding information is not deemed confidential under section 44.035(b).

Next, you claim that section 552.104 excepts the bid proposals from public disclosure. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). You have not specifically alleged that the school district is currently involved in a competitive bidding situation relating to these construction projects. Consequently, we conclude that you may not withhold any information in the bid proposals under section 552.104.

You further assert that the bid proposals are confidential under section 552.127(c) of the Government Code. Section 552.127(c) states that information submitted by “a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.” Section 552.127(c) expressly states that bidding information is subject to public disclosure unless it is made confidential by other law. Thus, section 552.127(c), itself, does not make the bid proposals confidential. You may not withhold the requested bid proposals under section 552.127(c).

Finally, you argue that the section 552.110 excepts the bid proposals from public disclosure. Since the property rights of third parties may be implicated by the release of the requested information, this office notified Browning Construction Company (“Browning”), Eaton Contracting Co., Inc. (“Eaton”), and Joeris, Inc. of the request for information. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). The school district also provided this office with arguments against disclosure.

Because Eaton did not respond to our notice, we have no basis to conclude that Eaton’s proprietary interests will be harmed by the release of documents relating to them. *See* Open Records Decision No. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Therefore, the school district must release documents relating to Eaton to the requestor.

Joeris makes a conclusory assertion that its financial statements and employees’ resumes are proprietary information. Browning makes general arguments that its bidding information is excepted by section 552.110. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). Because neither you nor Joeris or Browning has cited to a statute or judicial decision that makes the commercial or financial information privileged or confidential, you may not withhold the requested information under the commercial or financial information prong of section 552.110.

The Texas Supreme Court has adopted the definition of “trade secret” from the Restatement of Torts, section 757, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

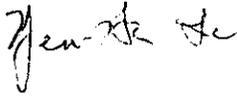
RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records

After reviewing Joeris's and Browning's arguments, we conclude that neither has established that its bidding information is protected as a trade secret under section 552.110. *See* Open Records Decision No. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The requested information must, therefore, be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 124639

Enclosure: Submitted documents

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