



June 15, 1999

Mr. Scott Fawcett
Legal Counsel
Open Records Division
Comptroller of Public Account
111 East 17th Street, 6th Floor
Austin, Texas 78701-0100

OR99-1660

Dear Mr. Fawcett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124963.

The Comptroller of Public Accounts (the "comptroller") received a request for all contracts between the comptroller and Intelligent Technologies Corporation ("ITC") for the period beginning 1994 through the present. Although you express no opinion on the release of the requested information, you contend that section 552.110 of the Government Code may be implicated because ITC has indicated that most of its proposal contains proprietary information.

Since the property rights of a third party may be implicated by the release of the requested information, this office notified ITC 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 the Public Information Act in certain circumstances).

ITC makes general arguments that its proposal 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 ITC has not 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

After reviewing ITC’s arguments, we conclude that ITC has not established that its proposal 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). Thus, you may not withhold the requested information under the trade secret prong of section 552.110.

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 Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Lastly, ITC argues that section 552.108 of the Government Code excepts the requested information from public disclosure. We do not believe that section 552.108 is applicable in this instance. Section 552.108 is designed to protect a governmental body's interest. The comptroller does not seek to withhold the information at issue based on this section. *See* Open Records Decision No. 522 at 4 (1989) (governmental body may decide not to raise permissive exceptions). Therefore, the requested information may not be withheld pursuant to section 552.108. The requested information must 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# 124963

Enclosure: Submitted documents

cc: Mr. Marc T. Shivers
Hughes & Luce, L.L.P.
111 Congress Avenue, Suite 900
Austin, Texas 78701
(w/o enclosures)

Ms. Elizabeth Grieco Cunningham
General Counsel
Intelligent Technologies Corporation
Houston Building, Suite 350
9015 Mountain Ridge Drive
Austin, Texas 78759
(w/o enclosures)