



September 15, 1999

Mr. Duncan Fox  
Assistant Chief  
Legal Services  
Texas Department of Public Safety  
5805 N. Lamar Boulevard  
Austin, Texas 78773-0001

OR99-2569

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 127256.

The Texas Department of Public Safety (the "department") received five requests for information relating to its recent Request for Offers for Consulting Services for Professional Business Reengineering. Each of the requestors has asked for copies of one or more of the proposals submitted to the department. Although you do not take a position on the release of the proposals, you raise section 552.110 of the Government Code on behalf of the companies that submitted proposals to the department.

We notified these companies of the requests 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 following companies responded to our notice: BrightStar Information Technology Group, Inc. ("BrightStar"), Deloitte Consulting, L.L.C. ("Deloitte"), McManis Associates, Inc. ("McManis"), PricewaterhouseCoopers L.L.P. ("Pricewaterhouse"), and TLI Management Consultants ("TLI"). Each of these companies contends that portions of its proposal are excepted from disclosure under section 552.110 of the Government Code.

We did not receive responses from the following companies: Andersen Consulting, Arthur Andersen, L.L.P., and Renaissance Government Solutions. Therefore, we have no basis to conclude that their proposals are excepted from disclosure under section 552.110 of the Government Code. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex.App. -- Austin 1999, no pet.h.) (section 552.110 excepts from disclosure commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision); Open Records Decision Nos. 552 at 5 (1990) (section 552.110 requires a party to establish, by a *prima facie* case, that information is a trade secret), 542 at 3 (1990).

Additionally, we received an unsolicited response from Spectrum Consulting Group stating that it no objection to the release of its proposal. The department should release the proposals of the following companies in their entirety: Andersen Consulting, Arthur Andersen, L.L.P., Renaissance Government Solutions, and Spectrum Consulting Group.

Section 552.110 of the Government Code protects the property interests of private persons 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. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

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 single or ephemeral events 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) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental

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<sup>1</sup>The 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 others 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).

body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

BrightStar, Deloitte, McManis, Pricewaterhouse, and TLI each argue that portions of their proposals are excepted from disclosure under section 552.110 as trade secrets. We have carefully reviewed the arguments submitted by each of these companies and reached the following conclusions:

1. BrightStar claims that Appendix A to its proposal is a trade secret, but has not supported its claim with a *prima facie* case for exception under section 552.110. Therefore, Appendix A to BrightStar's proposal is not excepted from disclosure.
2. The following pages of Deloitte's proposal are within the Restatement's definition of trade secret, and Deloitte has established a *prima facie* case for exception of these pages under section 552.110: Project Costs and Underlying Assumptions page 1, Project Approach and Methodology pages 1 through 20. The department must, therefore, withhold these pages of Deloitte's proposal from disclosure under section 552.110.
3. McManis contends that its "cost information" is a trade secret, but has not supported its claim with a *prima facie* case for exception under section 552.110. Therefore, McManis' "cost information" is not excepted from disclosure.
4. The following pages/sections of Pricewaterhouse's proposal are within the Restatement's definition of trade secret, and Pricewaterhouse has established a *prima facie* case for exception of these pages/sections under section 552.110: section 3, pages 4-6 through 4-20 of section 4, and appendix C of volume II. The department must, therefore, withhold these pages/sections of Pricewaterhouse's proposal from disclosure under section 552.110.
5. TLI claims that several sections of its proposal are trade secrets, but has not supported its claim with a *prima facie* case for exception under section 552.110. Therefore, these sections of TLI's proposal are not excepted from disclosure.

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*, 994 S.W.2d 766 (Tex.App. -- Austin 1999, no pet.h.). None of the companies that submitted arguments to this office cited to a statute or judicial decision that makes commercial or financial information privileged or confidential. Therefore, none of the information at issue is excepted from disclosure under the commercial or financial information prong of section 552.110. With the exception of the sections listed above that are protected as trade secrets, the department release the proposals to the requestors.

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,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 127256

Encl. Submitted documents

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