



November 8, 2000

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
John B. Connally Building, 6th Floor
301 Tarrow
College Station, Texas 77840-7896

OR2000-4348

Dear Mr. Kelly

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141041.

The Texas A&M University System (the "university") received a request for all proposals submitted to the university in response to a specific Request for Proposal.¹ The responsive information consists of two proposals: one submitted by the requestor, Ship Analytics International ("Ship Analytics"), and by Buffalo Computer Graphics ("BCG"). While you claim no exception to required disclosure on behalf of the university, you have notified both companies of the request pursuant to section 552.305 of the Government Code. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released). Predictably, Ship Analytics has not submitted any objections to the release of its proposal. However, BCG has submitted arguments to support its claim that portions of its proposal are excepted from required disclosure under section 552.110 of the Government Code.² We have considered the exception BCG claims and reviewed the submitted information that is at issue.

BCG claims, through its "major teaming partner," Transas Marine, that various portions of BCG's bid proposal contain trade secrets and are therefore excepted under section 552.110(a). Section 552.110(a) provides:

¹The same requestor also requested additional information which the university intends to release to the requestor.

²BCG has also raised section 552.101 of the Government Code in regard to information that BCG claims contains trade secrets. Because section 552.110 is the proper exception to raise in regard to trade secrets, we interpret BCG's objections to disclosure to be based exclusively on section 552.110. *See Gov't Code § 552.110(a)*.

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

Gov't Code § 552.110(a). A "trade secret"

may consist of 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). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979).⁴

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 party's claim for exception as valid under that branch if that ~~person~~ party 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): However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

BCG claims that the following portions of its proposal contain trade secrets: the technical drawings and installment configuration planning documents found in sections 2.1, 2.2, 2.31, and 2.8; the performance period schedule found in section 3.1.1; the reference sites and letters of approval found in section 3.2.3, 3.2.5, and 3.3.2; resumes found in section 3.2.6, a compliance matrix found in section 3.3.1; and cost data found in section 4.0. We find that BCG has not made a prima facie showing that the resumes are trade secrets. See Open Records Decision No. 319 (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). BCG has also not adequately shown that the letters of approval in section 3.3.2 contain trade secrets. BCG argues that these letters contain trade secrets in that they reveal BCG's customers. However, based on our review of the those letters in this section which are in English, the letters pertain to certification of equipment and recognition of professional contributions. We find that BCG has failed to show that these letters reveal customers or any other type of trade secret. We are also unconvinced that BCG has adequately shown that the compliance matrix contains trade secrets. BCG argues that this information "provides a very clear statement of the precise technical capabilities of each module and function within each compartment of a large integrated system." However, because the compliance matrix seems to indicate only that BCG's proposal meets the RFP's requirements, we do not see how it reveals trade secrets. Finally, in regard to the remaining information at issue, we find that BCG has made a prima facie case that the information contains trade secrets and is therefore excepted under section 552.110(a).

In conclusion, under section 552.110(a), the university must withhold the following portions of BCG's proposal: the technical drawings and installment configuration planning documents found in sections 2.1, 2.2, 2.31, and 2.8; the performance period schedule found in section 3.1.1; the reference sites found in section 3.2.3 and 3.2.5; and cost data found in section 4.0. The university must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/er

Ref: ID# 141041

Encl: Submitted documents

cc: Mr. Keith O. Palmer
Ship Analytics International
P.O. Box 16439
Galveston, Texas 77552
(w/o enclosures)

Mr. Gary F. Masterson
Director of Marine Simulation
Buffalo Computer Graphics
3741 Lake Shore Road
Blasdell, N.Y. 14219
(w/o enclosures)

Mr. Gerald J. Karlnoski, Vice President
Buffalo Computer Graphics
3741 Lake Shore Road
Blasdell, N.Y. 14219
(w/o enclosures)

Mr. George L. Toma, President
Transas Marine, Inc.
19105 36th Ave. W., Ste. 101
Lynnwood, WA 98036
(w/o enclosures)