



January 9, 2001

Ms. Cathy Bradford  
Open Records Coordinator  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744-3291

OR2001-0102

Dear Ms. Bradford:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143036.

The Texas Parks and Wildlife Department (the "department") received a request for information pertaining to certain proposals submitted to the department for a hunting and fishing licensing sales system. The department initially asserted that some of the responsive information contained in proposals submitted to the department by Central Bank and by Electronic Data Systems Corporation ("EDS") may be excepted from disclosure under section 552.110 of the Government Code. The department makes no arguments in support of its section 552.110 assertion, but the department notified Central Bank and EDS of the request by a letter dated October 31, 2000, in compliance with 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); 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). We understand that Central Bank has informed the department that it has no objection to the release of its information. Accordingly, the department has withdrawn its request for a decision of this office with regard to Central Bank's information. However, EDS responded to the notice and asserts that portions of its information are excepted from disclosure under section 552.110 of the Government Code. We have considered the asserted exception and reviewed the submitted information.

Section 552.110 protects the interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *See*

Gov't Code § 552.110(a), (b). Among other arguments, EDS asserts the applicability of the second prong of section 552.110, section 552.110(b), to the following portions of its proposal: section 2.4.5 (pages B1 through B5), section 2.4.7 (pages D-16 through D-25), section 2.4.9, and section 2.4.14 (pages K-1 through K-5).

To prevent disclosure of commercial or financial information pursuant to section 552.110(b), the party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. Upon careful consideration of the arguments submitted by EDS and our review of the information at issue, we believe that EDS has demonstrated through specific factual assertions that it actually faces competition, and that EDS would likely suffer substantial competitive harm if the following information were to be released to the public: section 2.4.5 (pages B3 through B5), and section 2.4.7 (pages D-16 through D-25).

As to the information contained in pages B1 and B2 of section 2.4.5, as well as the entirety of section 2.4.14 (pages K-1 through K-5), we find that EDS has not demonstrated through specific factual or evidentiary material, rather than conclusory or generalized allegations, that EDS would likely suffer substantial competitive injury from the public release of this information. In addition, EDS has provided no comments or arguments with reference to the information contained in the submitted section 2.4.11 of its proposal, and we therefore have no basis for concluding that this information is excepted from disclosure.

EDS also asserts section 552.110(a) to pages B1 and B2, asserting these pages contain or consist of trade secrets. 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 at 2 (1990). 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> Section 757 provides that a trade secret is

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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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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.

This office has held that if a governmental 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). Upon careful review of the information contained in the pages B1 and B2, we find that EDS has not made a *prima facie* demonstration that this information contains or consists of trade secrets.

As to the information contained in section 2.4.9 (cost information), we do not believe that the general costs associated with a proposal may be withheld as commercial or financial information under the second prong of section 552.110 where a legitimate public interest exists in the information. 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. Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government); *see also* Open Records Decision Nos. 541 (1990), 514 (1988). The public has an interest in knowing the terms that a governmental body negotiates with third parties for contracts. We are not advised in this instance whether EDS was the winning bidder. If so, we believe a legitimate public interest exists in the information contained in section 2.4.9 and that the information therefore is not excepted under section 552.110(b). If, on the other hand, EDS was not the winning bidder, we find that the information contained in section 2.4.9 is excepted from disclosure pursuant to section 552.110(b).

In summary, pursuant to section 552.110 of the Government Code, the department must withhold pages B3 through B5 of section 2.4.5, and section 2.4.7 (pages D-16 through D-25).

Pages B1 and B2 of section 2.4.5, as well as the entirety of section 2.4.14 (pages K-1 through K-5) and section 2.4.11 are not excepted from disclosure and must be released. If EDS was the winning bidder, section 2.4.9 must also be released. Otherwise, section 2.4.9 is excepted from disclosure and must be withheld.

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).

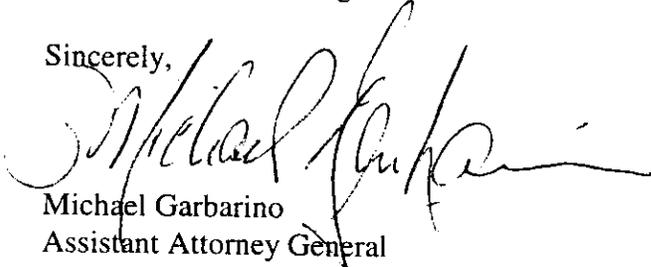
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at 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,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 143036

Encl. Submitted documents

cc: Ms. Stacy Roland  
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(w/o enclosures)