



January 16, 2001

Ms. Nanette G. Williams
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2001-0158

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143242.

The City of El Paso (the "city") received a request for "the entire proposal content provided to the City of El Paso by Orbital Sciences in response to The City's RFP for its CAD/AVL and AVL system." The city provided this office with "the entire Orbital offer and its follow-up Best and Final Offer" for review, and indicated that the property rights of a third party, Orbital Sciences Corporation ("Orbital") are implicated by the release of the requested information.¹ The city notified Orbital of the request for this 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 Act in certain circumstances). The notice required under section 552.305 of the Government Code informs the third party that it may submit to the attorney general, within ten days of receiving the notice, its reasons why the information in question should be withheld. In response to the city's notice, Orbital provided comment to the city arguing that portions of the responsive information are excepted from public disclosure by sections 552.101 and 552.110 of the Government Code. The city forwarded Orbital's comments to this office. We have considered the arguments raised by Orbital and have reviewed the submitted information.

The following is an outline of the information that Orbital seeks to withhold:

¹The submitted materials include what are apparently materials from Orbital's oral presentation. As this information is not responsive to this request it is not addressed in this decision.

Volume I of Technical Proposal

Executive Summary

Profile of Firms

Qualification of Firms

Description of Proposed Offering

Introduction

System Functions

User Interface

Software Requirements

Hardware Characteristics

Configuration Characteristics and Availability

Inspection, Test and Availability

Training Support Services, and Maintenance

Project Management, Schedule and Documentation

Table of Conformance

Work Plan and Schedule

Proposed Staffing and Qualifications

Other Technical Information

Volume II Cost and Contractual Proposal

Cost Proposal

Contractual Proposal

Warranty and Maintenance Agreements

Appendix A: Equipment List

Appendix C: Sample Manuals

Appendix E: Sample Test Plans

Best and Final Offer

Cost Proposal

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Orbital does not provide any argument independent of its assertion of protection under section 552.110 which supports a claim that the responsive information is confidential by law. Therefore, section 552.101 will not be addressed further and this decision is limited to

Orbital’s assertion of section 552.110 of the Government Code. Section 552.110 provides:

- (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.

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

Although Orbital does not specifically assert or argue that the responsive information constitutes trade secrets, as it quotes section 552.110 in its entirety, we will address the trade secret aspect of the section 552.110 exception. 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). 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). 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). 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).

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).

Orbital's comments address only Restatement factor (4), the value of the information to the company and its competitors. Orbital does not indicate to what degree the information is in fact secret, or otherwise establish that any of the responsive information is a trade secret. We conclude that Orbital has not established a *prima facie* case that the responsive information may be excepted from disclosure under the trade secret aspect of section 552.110 of the Government Code.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Orbital informs us that it competes on dozens of transportation management systems nation wide and that consolidation in this market creates a "head to head" competitive environment with the requestor. Orbital also contends that competitors access to the responsive information would harm Orbital by allowing its competitors to duplicate Orbital's technical solution, to improve the competitor's own technical solutions, and to undercut Orbital's marketing and business strategies. We conclude that Orbital has alleged sufficient specific facts to establish that much, but not all, of the information it seeks to withhold is protected under the commercial or financial information aspect of section 552.110 of the Government Code. We have marked the submitted information to indicate the portions which may be withheld under section 552.110(b) of the Government Code and that portion which must be made available to this requestor.

We note that some of the submitted materials are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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).

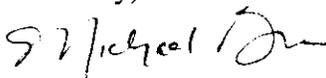
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 143242

Encl: Submitted documents

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