



August 31, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3865

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151413.

The Texas Department of Human Services (the "department") received a request for information relating to RFO # GT1004, including the proposals submitted by other respondents to the RFO and the scoring and detailed remarks of the reviewers of all of the proposals. You inform this office that there are no responsive scorings or detailed reviewers' remarks. Chapter 552 of the Government Code does not require a governmental body to disclose information that did not exist when the request for the information was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also inform us that two other entities, Arthur Andersen and RCG Information Technology ("RCG"), responded to the RFO. You state that both entities were informed of the request for their proposals. You advise us that as RCG had no objection to the disclosure of its proposal, that information has been released.

You also inform us that Arthur Andersen objected to the disclosure of portions of its proposal. Accordingly, the department believes that this request for those portions of the proposal implicates Arthur Andersen's proprietary interests. The department notified Arthur Andersen of its right to submit arguments to this office as to why its proposal should not be released.¹ You provided this office with a copy of Arthur Andersen's proposal, which we have reviewed. Arthur Andersen submitted comments, which we have considered.

¹See Gov't Code § 552.305(d); 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 to disclosure under chapter 552 of the Government Code in certain circumstances).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) a trade secret obtained from a person and privileged or confidential by statute or judicial decision, and (2) 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. *See* Gov't Code § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" branch of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

Section 552.110(b) of the Government Code requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Arthur Andersen claims an exception to disclosure under section 552.110 for the following portions of its proposal: (1) Part D, "Detailed Plan of Work" (pages 3 through 13 of the proposal³); (2) portions of Part E, "Estimated schedule" (information relating to pricing)⁴; (3) portions of Parts F, "References," and G, "Offeror information form and qualifications" (information relating to the company's clients and previous engagements)⁵; and (4) Part I, "Project Costs."⁶ Arthur Andersen claims that this information constitutes a trade secret of the company under section 757 of the Restatement of Torts. Arthur Anderson also asserts that the release of this information would cause the company substantial competitive harm.

We have considered Arthur Andersen's arguments and have carefully reviewed the portions of its proposal that are at issue. We conclude that the list of current clients that appears at page 18 of the proposal qualifies as a trade secret under section 552.110(a) of the Government Code. Arthur Andersen has not demonstrated, however, that any of the remaining information at issue constitutes a trade secret for the purposes of section 552.110(a). We have marked the client information that the department must withhold under section 552.110(a). Under section 552.110(b), Arthur Andersen has demonstrated that the release of pages 4 through 13 of Part D of the proposal would cause Arthur Andersen substantial competitive harm. Arthur Anderson has not persuaded us, however, that any of the remaining information relating to the company's previous engagements, billing methods and amounts, and other matters must be withheld under section 552.110(b). Therefore, the client information of Arthur Andersen that we have marked must be withheld under section 552.110(a) and pages 4 through 13 of Arthur Andersen's proposal must be withheld under section 552.110(b). The rest of the proposal must be released.

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.

³Although Arthur Andersen refers to "pages 2 through 13," Part D begins at page 3 of the copy of the Arthur Andersen proposal that the department submitted to this office.

⁴Although Arthur Andersen refers to "page 15," this information appears at page 14 of the submitted document.

⁵This appears to be the information that Arthur Andersen describes as appearing in Part F, "Offeror Identifying Information," at pages 17 through 19.

⁶Part I appears at page 24 of the submitted document.

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).

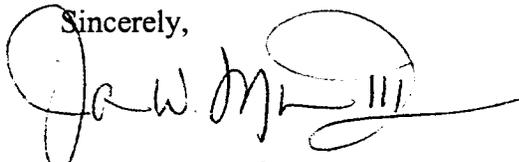
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 151413

Enc: Submitted documents

c: Mr. John F. Walker
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