



February 19, 2002

Ms. Sarajane Milligan
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2002-0798

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158713.

The Harris County Purchasing Agent (the "agent") received a request for copies of the bid tabulations for job numbers 01/0184 and 01/0136 and a second request for access to the bid responses for job number 01/0184. You advise that the first requestor narrowed his request to only concern job number 01/0184. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Although you do not claim any exceptions on behalf of the agent, you advise us that release of the requested information may implicate the proprietary interests of several third parties, namely Southwestern Bell, Verizon Southwest ("Verizon"), Affiliated Telephone, Inc. ("Affiliated Telephone"), Shared Technologies Fairchild ("Shared Technologies"), and Nextira LLC ("Nextira"). Pursuant to section 552.305 of the Government Code, you notified each of these third parties of the agent's receipt of the request so that each party could respond with arguments regarding the confidentiality of their respective proposals. *See* Gov't Code § 552.305 (permitting interested third party, within ten days of receiving the governmental body's notice, to submit to attorney general reasons why requested information should not be released); *see also* 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 have considered the exceptions claimed and have reviewed the submitted information.¹

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit reasons, if any, as to why requested information relating to that party should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this ruling we have not received any comments from Shared Technologies or Verizon regarding their respective proposals. As a result, we have no basis to conclude that either party's information is excepted from disclosure under section 552.110 of the Government Code. Therefore, we find that you may not withhold any portion of either party's information from disclosure under that provision. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, 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); see also Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We have, however, received comments from the remaining third parties, and, thus, address the applicability of section 552.110 to each of their respective bid proposals. Section 552.110 excepts 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.

¹ We note that although we did not receive any documents entitled or otherwise designated as bid tabulations, we assume that the submitted bid responses encompass the requested bid tabulations.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *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” component of section 552.110 to the information at issue, this office will accept a person’s trade secret claim 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).

Section 552.110(b) excepts from disclosure “[c]ommercial 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.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, 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).

Nextira contends that four specific pages of its proposal relating to pricing contain Nextira’s trade secret information. Based on our review of Nextira’s arguments and this information, it appears that the information relates solely to this particular procurement process. Consequently, we do not believe that Nextira has shown that the release of this information will negatively impact future competitive situations. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 184 (1978). Accordingly, the

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).

agent may not withhold any portion of these four pages from disclosure pursuant to section 552.110 of the Government Code.

Affiliated Telephone states that it keeps certain types of information found in its proposal confidential. Southwestern Bell states that it objects to disclosure of its information to any third party, particularly a competitor. However, based on these representations, we cannot conclude that either Southwestern Bell or Affiliated Telephone has put forth a prima facie case that this information constitutes trade secret information or has shown through specific factual evidence that disclosure of this information would cause substantial competitive harm. See Gov't Code § 552.110(a), (b). Accordingly, the agent may not withhold any portion of Southwestern Bell's or Affiliated Telephone's information from disclosure pursuant to section 552.110 of the Government Code.

We note, however, that the information contains e-mail addresses. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in pertinent part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the agent to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the members of the public have affirmatively consented to their release. As there is no indication that the members of the public have consented to release of the email addresses in question, the agent must withhold from disclosure the representative sample of e-mail addresses that we have marked pursuant to section 552.137 of the Government Code. The remaining information must be released to the requestor.

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 Texas Building and Procurement 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 158713

Enc. Marked documents

cc: Mr. Kerry Judge
Affiliated Telephone, Inc.
7115 Belgold, Suite F
Houston, Texas 77066
(w/o enclosures)

Mr. Jeff W. Dixon
Shared Technologies Fairchild
8601 Jameel Street, Suite 100
Houston, Texas 77040
(w/o enclosures)

Ms. Sarah Weaver
Verizon Southwest
6210 Rothway
Houston, Texas 77040
(w/o enclosures)

Ms. Drue T. Ploog
Nextira LLC
2800 Post Oak Boulevard, MD 24-2
Houston, Texas 77056
(w/o enclosures)

Ms. Carri David
SBC Southwestern Bell
6500 West Loop South, Zone 2.7
Bellaire, Texas 77401
(w/o enclosures)