



March 13, 2002

Ms. Ann-Marie P. Sheely
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2002-1498

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160327.

The Travis County Community Supervision and Corrections Department (the "county") received a written request for all vendor proposals submitted to the county in response to an RFP for electronic monitoring equipment and services. You do not contend that the requested information is excepted from disclosure under chapter 552 of the Government Code, but rather have sought a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public.

We note at the outset that you acknowledge that you did not request a decision from this office within ten business days after the county's receipt of the records request. Section 552.301(a) of the Government Code requires a governmental body to request a decision from the attorney general within ten business days after receiving a request for information that the governmental body wishes to withhold, unless there has been a previous determination that the requested information is excepted from required public disclosure. When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling reason to withhold the information to overcome this presumption. Gov't Code § 552.302; *see also Hancock*, 797 S.W.2d at 381.

A compelling reason for withholding information is demonstrated where information is made confidential by other law or where third party interests are at issue. Open Records Decision No. 150 (1977). Because the current records request implicates the property interests of the businesses responding to the RFP, we will consider the extent to which the requested records at issue are subject to required public disclosure. *See id.*

In accordance with section 552.305(d), the county was required to notify the four businesses of the records request and of their right to submit arguments to this office as to why their respective proposals should not be released to the public. *See 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 Public Information Act in certain circumstances). 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 its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. This office did not receive responses from Strategic Monitoring Services, Security Link, or Sentinel Offender Services, L.L.C. Accordingly, the county must release these companies' proposals to the requestor in their entirety, with the following exceptions.

Please note that the Seventy-seventh Legislature added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential. This section provides in relevant 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. Accordingly, section 552.137 of the Government Code requires the county to withhold certain e-mail addresses contained in the records at issue, which we have marked, unless the respective communicant has affirmatively consented to its release.

We now address whether the remaining proposal submitted to the county is subject to disclosure. This office received arguments from General Security Services Corporation ("GSSC") that its proposal is excepted from required public disclosure pursuant to sections 552.104 and 552.110 of the Government Code. Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 was not intended to protect business entities that are in competition in the private sector. The primary purpose of section 552.104 is to protect

the *government's* purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders.¹ Consequently, no portion of the GSSC proposal is excepted from public disclosure under section 552.104.

Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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. GSSC contends that its proposal is confidential under both branches of section 552.110.

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.² *Id.* 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). The commercial or financial branch of section 552.110 requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that disclosure would cause substantial competitive injury to the entity from whom the information was obtained. *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).

After reviewing GSSC's brief to this office, we conclude that GSSC has demonstrated that the release of portions of its proposal would result in substantial competitive harm to GSSC and, therefore, these portions are excepted from public disclosure as confidential commercial and financial information. Specifically, the county must withhold the information we have

¹We also note that section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

²The 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).

marked under Tab A, as well as all of the information under Tab B, pursuant to section 552.110(b) of the Government Code. However, we do not believe that GSSC has demonstrated how its pricing information contained under Tab D is a trade secret or commercial or financial information the release of which would cause them substantial competitive harm. *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 pricing not excepted under section 552.110 and that pricing proposals are entitled to protection under section 552.104 only during bid submission process), 184 (1978); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/RWP/sdk

Ref: ID# 160988

Enc: Submitted documents

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