



July 25, 2002

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR2002-4083

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166203.

The University of Texas M.D. Anderson Cancer Center (the “center”) received a request for “all of the RFP responses except for EXTEND Communications response to RFP 973195/GK.” The center initially claimed that the requested information was excepted from disclosure under section 552.104 of the Government Code, but later withdrew that assertion by letter dated June 20, 2002. However, two third parties submitted briefs pursuant to section 552.305 of the Government Code arguing that sections 552.101 and 552.110 bar release of portions of the requested information.¹ We have therefore considered the exceptions claimed and reviewed the submitted information.

We note initially that Network Associates, one of the third parties notified by the center of its right to submit a third party brief under section 552.305 of the Government Code, has failed to submit a brief. Thus, we have no choice but to order the center to release the Network Associates proposal.

We next address Amcom’s assertions that section 552.101 bars the release of its RFP response. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 2156.123 of the Government Code provides:

¹ 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).

(a) The commission or other state agency shall avoid disclosing the contents of each proposal on opening the proposal and during negotiations with competing offerors.

(b) The commission or other state agency shall file each proposal in a register of proposals, which, after a contract is awarded, is open for public inspection unless the register contains information that is excepted from required disclosure under Subchapter C, Chapter 552.

Gov't Code § 2156.123(a), (b). Subchapter C of chapter 2156 of the Government Code prescribes procedures for the use of competitive sealed bid proposals by state agencies. *See* Gov't Code § 2156.121. We note that section 2156.123 does not contain express language that makes information confidential. This office has held that the statutory confidentiality protected by section 552.101 requires express language making certain information confidential. Open Records Decision No. 478 (1987) (construing statutory predecessor to section 552.101). Thus, because section 2156.123 does not expressly make information confidential, the center may not withhold Amcom's RFP response under section 552.101 in conjunction with section 2156.123 of the Government Code.

We now address Amtelco's assertions under section 552.110 of the Government Code. Section 552.110 of the Government Code protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets 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). Amtelco invokes both components of section 552.110.

The Texas Supreme Court has adopted the definition of a "trade secret" from the Restatement of Torts, section 757, 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); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to requested information, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. *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[.]” Gov’t Code § 552.110(b). This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would 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).

We first consider Amtelco’s assertion that its reference list constitutes a trade secret for purposes of section 552.110. Amtelco asserts that its reference list constitutes a part of its customer list. Upon consideration, we find that Amtelco has satisfied its burden to establish a *prima facie* case that its customer list is a trade secret. We have received no rebuttal to this *prima facie* case. Accordingly, we find that center must withhold Amtelco’s customer list as a trade secret under section 552.110(a) of the Government Code.

We now consider Amtelco’s assertion that its RFP response and the information relating to pricing, rates, and charges that Amtelco refers to as “attachment A and related addendum” must be withheld under section 552.110. Amtelco does not address the six factors that are relevant to the question of whether a private party has made a *prima facie* case under section 757 of the Restatement of Torts.² *Id.* Nor does Amtelco explain how this information meets the Restatement definition of a trade secret. Furthermore, we find that Amtelco has not demonstrated that the RFP response or the information relating to pricing,

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).

rates, and charges is excepted from disclosure under section 552.110(b). Amtelco made conclusory statements and did not provide a specific factual or evidentiary showing that substantial competitive injury likely would result from release of the information at issue. Accordingly, we conclude that Amtelco has failed to satisfy its burden of establishing that either prong of 552.110 applies to the submitted RFP response or the information relating to pricing, rates, and charges. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 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 and that pricing proposals are entitled to protection only during bid submission process), 184 (1978). Therefore, the center may not withhold Amtelco's RFP response or its information relating to pricing, rates, and charges under section 552.110.

Finally, we note that Amcom and Network Associates' proposals contain e-mail addresses. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.³ Section 552.137 provides:

- (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. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The center must, therefore, withhold e-mail addresses of members of the public included in Amcom and Network Associates' proposals under section 552.137. The center may not withhold governmental e-mail addresses under section 552.137.

In summary, we find that the center must withhold Amtelco's customer list under section 552.110(a). The center must also withhold e-mail addresses of members of the public included in Amcom and Network Associates' proposals under section 552.137. The rest of the requested information must be released.

³House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

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).

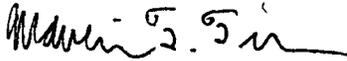
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 166203

Enc. Submitted documents

c: Ms. Leslie Notor
Chief Financial Officer
XTEND Communications Corp.
171 Madison Avenue
New York, New York 10016
(w/o enclosures)

Mr. Jason Earnest
Director
Network Associates
13465 Midway Road
Dallas, Texas 75244
(w/o enclosures)

Mr. Eric E. Jorstad
Faegre & Benson, LLP
90 South 7th Street, Suite 2200
Minneapolis, Minnesota 55402-3901
(w/o enclosures)

Mr. Joseph Everly
CEO
Amtelco
4800 Curtin Drive
McFarland, Wisconsin 53558
(w/o enclosures)