



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 1, 2003

Ms. Kathleen Spears
Officer For Public Information
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2003-5354

Dear Ms. Spears:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185170.

The Dallas County Hospital District (the "district") received a request for information related to responses to the Opportunity to Present Qualifications issued by a consultant on behalf of the district for two business services contract projects. In particular, the requestor asks for "all documents relating to the (1) Business and Clinical Design Project and the (2) Business Integration Services Project[,] including, but not limited to, the contracts, requests for proposal, and responses." You state that the district does not have a copy of the Opportunity to Present Qualifications document, and you advise that the consultant contends that the document is the property of the consultant and not the district. With respect to the responses, you state that the district received two proposals for the Business and Clinical Design Project, from Cap Gemini Ernst & Young U.S., L.L.C. ("Cap Gemini") and First Consulting Group ("First Consulting"), and two proposals for the Business Integration Services Project, from Cap Gemini and Perot Systems Healthcare Services, L.L.C. ("Perot Systems"). You state that some information submitted by First Consulting has been provided to the requestor. You indicate, however, that portions of the submitted proposals and the contracts awarded on each project may be excepted from disclosure under section 552.110(b) of the Government Code. You provide documentation showing that you notified Cap Gemini, First Consulting, and Perot Systems of the request and of their right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory

predecessor to § 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). We have considered the exception you claim and reviewed all the submitted information.

As a preliminary matter, we note that the present request was made by the Dallas County District Attorney's Office (the "district attorney") rather than a member of the public. In Open Records Decision No. 661 (1999), this office ruled that the question of whether a governmental entity may release information to another governmental entity is not a question under the Public Information Act (the "Act") as the Act is concerned with the required release of information to the public. Gov't Code §§ 552.001, .002, .021; *see* Attorney General Opinions, H-683 (1975), H-242 (1974), M-713 (1970); Open Records Decision No. 655 (1997). Further, this office has concluded that information may generally be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). Thus, the release of information by one agency to another agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for those of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. *Id.* In this case, therefore, the district has the discretion to release the requested information pursuant to the intergovernmental transfer doctrine waiving the district's claim that the information is excepted from public disclosure. In the event you decline to exercise this discretion, we will address the submitted arguments against disclosure.

We must address the district's obligations under the Act with respect to the requested Opportunity to Present Qualifications document. As noted, the district's consultant contends that this document is not the property of the district. We understand you to represent that this document may not be subject to the Act. Section 552.002(a) of the Government Code defines "public information" subject to disclosure under the Act as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, in addition to encompassing information in the physical possession of a governmental body, the Act applies to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989). We therefore make the following determination: if the district does not have a right of access to the responsive Opportunity to Present Qualifications document maintained by the consultant, then the Act does not require the document to be disclosed to the requestor. On the other hand, if the district does have a right of access to the Opportunity to Present Qualifications document at issue, then under the Act the document is public information and is subject to release. *See* Gov't Code § 552.002. Because you have not submitted the document for review nor raised any exceptions to its disclosure, we have no basis to determine that the document may be withheld pursuant to an exception to disclosure under the Act. We therefore determine that, if the district has a right of access to the Opportunity to Present Qualifications document, the district must release the document to the requestor immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Next, you indicate that the submitted proposals and the contracts awarded on the projects at issue are subject to confidentiality agreements. We note, however, that information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. A governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under the [predecessor to the] Act cannot be compromised simply by its decision to enter into a contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision No. 514 (1988)."); *see also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (governmental agency may not bring information within scope of predecessor to section 552.101 of Government Code by promulgation of rule; to imply such authority merely from general rule-making powers would be to allow agency to circumvent very purpose of predecessor to Act), *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 673 (Tex. App.—Fort Worth 1997, pet. denied) ("Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy.") Consequently, the requested information must fall within an exception to disclosure in order to be withheld.

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 its 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 letter, Cap Gemini and First Consulting have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, Cap Gemini and First Consulting have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We therefore determine that the district may not withhold any of the submitted information pertaining to Cap Gemini and First Consulting pursuant to section 552.110 of the Government Code.

Perot Systems has provided comments to this office in which the company identifies portions of the information at issue that it contends are excepted from disclosure. Perot Systems objects to the release of specified information contained in the company's proposal for the Business Integration Services Project, as well as specified information in the subsequent Business Integration Systems Agreement between the company and the district. Upon review, however, we find that some of the information Perot Systems seeks to withhold has not been submitted to this office for our review. This ruling does not address the applicability of the company's claimed exceptions to disclosure to the portions of the information at issue that have not been submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under the Act must submit a copy or representative samples of the specific information requested). With respect to the information submitted to this office, we will address the arguments submitted by Perot Systems.

First, Perot Systems argues that the information at issue should be withheld pursuant to section 552.104 of the Government Code. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). Although Perot Systems argues that release of the information would harm the district's competitive interests, the district does not raise section 552.104 on its own behalf. We therefore determine that section 552.104 does not apply to the requested information. *See* Open Records Decision No. 592 (1991) (governmental body may waive

section 552.104). Thus, the district may not withhold any portion of the proposal submitted by Perot Systems pursuant to section 552.104 of the Government Code.¹

Perot Systems also contends that information pertaining to Perot Systems is confidential under section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code. 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 262.030(c) of the Local Government Code provides a competitive proposal procedure for the purchase of high technology items by a county, and states in pertinent part:

(c) If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. Open Records Decision No. 478 (1987). The plain language of section 262.030(c) does not expressly make bid proposals confidential. Section 262.030(c) only requires a governmental body to take adequate precautions to protect bid proposals from competing bidders. Accordingly, we determine that the information at issue is not confidential pursuant to section 262.030(c). Thus, the district may not withhold any portion of the information pertaining to Perot Systems pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

Next, Perot Systems contends that portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

¹In its comments to this office, Perot Systems makes reference to Open Records Letter No. 2003-0797 (2003), in which we ruled that certain information related to a request for proposal by the district for telecommunications and infrastructure services was excepted from disclosure pursuant to section 552.104. We note that in the situation addressed in Open Records Letter No. 2003-0797, the district raised section 552.104 to protect the district's own competitive interests. *See* Open Records Decision No. 592 (1991).

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records

Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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 to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review, we determine that Perot Systems has demonstrated that some of the submitted technical information and information pertaining to the company’s project methodologies is excepted from disclosure under section 552.110(b) of the Government Code. Thus, we have marked portions of the submitted information that the district must withhold pursuant to section 552.110(b). However, we find that Perot Systems has not established that the remainder of the submitted information consists of trade secrets for purposes of section 552.110(a). With respect to the pricing information the company seeks to withhold, we note that pricing information is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp.*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Moreover, while Perot Systems has generally alleged that release of the remainder of the submitted information would cause substantial competitive harm to the company, Perot Systems has not made a specific factual or evidentiary showing that such harm would result from the release of the information. Therefore, we find that the company has not adequately demonstrated that the remainder of the information at issue is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* Open Records Decision Nos. 661 (1999), 541 at 8 (1990) (general terms of contract with governmental body are usually not excepted from disclosure), 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); *cf.* Open Records Decision Nos. 514 (1988) (public has an interest in knowing prices charged by government contractors), 184 (1978). Consequently, the district may not withhold the remaining submitted information pertaining to Perot Systems pursuant to section 552.110 of the Government Code.

We note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. 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 materials protected by copyright, 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).

In summary, if the district has a right of access to the Opportunity to Present Qualifications document at issue, then the document is public information subject to the Act and must be released. We have marked the portions of the submitted information pertaining to Perot Systems that the district must withhold pursuant to section 552.110(b) of the Government Code. The remainder of the submitted information must be released in compliance with copyright law.

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 Dep't of Pub. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 185170

Enc: Submitted documents

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