



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

September 17, 2003

Ms. Druscilla Miller  
County Auditor  
Jasper County  
121 North Austin, Room 102  
Jasper, Texas 75951-4191

OR2003-6536

Dear Ms. Miller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187944.

The Jasper County Auditor's Office (the "county") received a written request for "your most current service agreement for" inmate telephone service and "a copy of the awarded bid." You contend that the requested information is excepted from required disclosure pursuant to section 552.104 of the Government Code. You have also notified the interested third party in this matter of their right to submit arguments to this office as to why any portion of the remaining requested information should not be disclosed. *See Gov't Code § 552.305* (allowing governmental bodies to rely on third parties having privacy or property interest in information to submit arguments as to why requested information should be withheld from public).

We note at the outset that "a contract relating to the receipt or expenditure of public or other funds by a governmental body" is generally "public information and not excepted from required disclosure . . . unless . . . expressly confidential under other law." *See Gov't Code § 552.022(a)(3)*. However, because you contend that this information is excepted from disclosure under section 552.104, we will address your arguments. *See Gov't Code § 552.104(b)* (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 generally does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You contend that the submitted information is protected under section 552.104 because the release of this information "may give [the requestor] or other future competitors or bidders when this service is released for bids again." We note that the records at issue pertain to a contract that has already been awarded, and that you have not demonstrated that the information at issue pertains to any other particular competitive situation. We therefore conclude that you have not met your burden of establishing the applicability of section 552.104 in this instance. Consequently, the county may not withhold any of the submitted information pursuant to section 552.104.

We therefore must address whether the interested third party has demonstrated a proprietary interest in the information at issue. 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 has timely received arguments from representatives of ADS-Telecom. We understand ADS-Telecom to raise section 552.110 of the Government Code for certain information contained in the records at issue.

Initially we note that information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any understanding between the county and ADS-Telecom specifying otherwise.

Section 552.110 protects both "trade secret" information and "commercial or financial" information. See Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. See *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.<sup>1</sup> *See id.* This office has held that we must accept a person's claim for exception as valid under the trade secret branch of section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure of the information at issue. *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); 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).

ADS-Telecom specifically argues that information revealing "our financials" are confidential because the release of those records would give the requestor's company a competitive advantage. However, after reviewing the information you submitted to this office as being responsive to the request and ADS-Telecom's arguments, we conclude that ADS-Telecom has not met its burden of demonstrating the applicability of section 552.110 to any portion of the submitted information. We therefore conclude that the county must release the submitted information in its entirety.

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

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<sup>1</sup> The 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).

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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/RWP/seg

Ref: ID# 187944

Enc: Submitted documents

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