



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 1, 2009

Mr. David K. Walker  
County Attorney  
Montgomery County  
207 West Phillips, Suite 100  
Conroe, Texas 77301

OR2009-12356

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 353982.

Montgomery County (the "county") received a request for a copy of the contract and any bid summaries or similar documents related to the procurement process for a digital radio system. You indicate that you have released some of the requested information. You claim, however, that some of the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.<sup>1</sup> You also state that the release of the submitted information may implicate the proprietary interests of third party Motorola, Inc. ("Motorola"). Accordingly, you inform us, and provide documentation showing, that you notified Motorola of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received correspondence from Motorola.<sup>2</sup> We have also received comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.110, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>2</sup>Motorola does not object to the release of the submitted equipment lists, which are dated December 6, 2007, and May 12, 2008.

should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that another statute makes confidential. The county and Motorola raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). These provisions make certain information related to terrorism confidential. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

*Id.* § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation"). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

In this instance, the submitted information consists of the winning proposal for the construction of a new public safety communications system for the county. We understand the county to assert that the communications system, once constructed, will constitute critical infrastructure of the county, and that release of the submitted information would identify vulnerabilities of this critical infrastructure to an act of terrorism. Motorola states that the information contained in specified portions of its proposal provides the technical details that "could allow a terrorist to identify particular vulnerabilities" of the county's communications system. Motorola further states that this information must be withheld from public disclosure "to prevent the public from being placed at risk from a potential terrorist attack[.]" Based on the submitted arguments and our review, we conclude the information we have marked is confidential under section 418.181 of the Government Code and must be withheld from disclosure on that basis under section 552.101 of the Government Code. However, we conclude that the county and Motorola have failed to establish that releasing the remaining information would reveal the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Further, we note that some of the radio frequencies contained in the submitted information are available to the public on the Federal

Communications Commission's internet website. Accordingly, the remaining information is not subject to section 418.181 of the Government Code and may not be withheld under section 552.101 on that basis. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980).

Motorola claims that the remaining information at issue is excepted from disclosure under section 552.110 of the Government Code. Although the county also argues that the information at issue is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of private third parties, not the interests of a governmental body. Thus, we do not address the county's arguments under section 552.110.

Section 552.110 of the Government Code 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

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* ORD 232. This office must accept a claim that information subject to the Act is excepted 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. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

Having considered Motorola’s arguments, we determine that it has failed to establish a *prima facie* case that any portion of its remaining information constitutes a trade secret. Therefore, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

We also find that Motorola has not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause it substantial competitive harm. Accordingly, the county may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (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 is too speculative).

In summary, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The remaining information must be released to the requestor.

~~This letter ruling is limited to the particular information 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 information or any other circumstances.~~

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 353982

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. David Little  
Mr. Dan Delaney  
Motorola, Inc.  
6450 Sequence Drive  
San Diego, California 92121  
(w/o enclosures)