



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 31, 1993

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
Office of the City Attorney
City Hall
Dallas, Texas 75201

OR93-761

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ We assigned your request ID# 22048.

The City of Dallas (the "city"), through its Economic Development Department, has received a request for information relating to applications for various city-sponsored economic incentives. The requestor seeks copies of all 1991, 1992, and 1993 correspondence between the city's Economic Development Department and the private sector members who have either participated in or considered participating in the various incentives offered by the city under its Public/Private Partnership Program. You advise us that some of the requested information will be made available to the requestor, but you wish to withhold portions of applications relating to "background" financial history, federal income tax returns, and "information provided with applications for tax abatement which are still pending." You have submitted this information to us for review and claim that it is excepted from required disclosure to the public by sections 552.101, 552.104, and 552.110 of the Government Code. You also refer us to section 7213 of the Internal Revenue Code, 26 U.S.C. § 7213, and to section 312.003 of the Tax Code.

¹We note that the Seventy-Third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

The Property Redevelopment and Tax Abatement Act is codified in chapter 312 of the Tax Code. Tax Code § 312.001. Section 312.003 of the Tax Code provides as follows:

Information that is provided to a taxing unit in connection with an application or request for tax abatement under this chapter and that describes the specific processes or business activities to be conducted or the equipment or other property to be located on the property for which tax abatement is sought is confidential and not subject to public disclosure until the tax abatement agreement is executed. That information in the custody of a taxing unit after the agreement is executed is not confidential under this section.

The application includes the applicant's name, address, and whether the applicant is a sole proprietorship, corporation, or partnership. If the applicant is a corporation or a partnership, it must provide a copy of the articles of incorporation² or partnership agreement and certain additional information. The applicant must also describe its business experience, provide surety and bankruptcy information, and information about litigation and tax payments. It must also submit financial statements, and, if the statements are not audited, federal tax returns. The application also describes the project, states the number of jobs to be created, and gives the cost of purchasing and developing the property. Attachments to the applications include documents showing control of property, property description information, and a statement of assurance regarding conflicts of interest and gifts to public servants.

Item 15 of the application requires the applicant to describe the project, including a narrative description of the business activity to be conducted and the development schedule. Some applicants have provided this information by attaching other documents, such as a leasehold agreement. We have found information confidential under section 312.003 of the Tax Code in some of the information provided in response to item 15 and have marked it accordingly. This information is confidential pursuant to section 312.003 until the tax abatement agreement is executed.

Title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms); 226 (1979) (W-2 forms). *See also Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). The federal tax returns included with the applications must be withheld from disclosure.

²Copies of articles of incorporation are available from the Secretary of State's Office. *See* Attorney General Opinion MW-163 (1980).

Pursuant to section 552.305 of the Government Code, we notified the parties whose proprietary interests are implicated by this request and received several responses. The respondents claim that sections 552.101, 552.104, and 552.110 except some of the submitted information from required public disclosure.³ Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. They also claim that the information submitted to us for review constitutes "trade secrets" and "commercial or financial information." We first address the "trade secrets" branch 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, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is:

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 single or ephemeral events in the conduct of the business, . . . [but] 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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757, cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" 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 one

³Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990) at 4-5. Neither the city nor the respondents indicate how the requested information relates to any competitive bidding situation or to a commercial transaction to which the city is party. Accordingly, we conclude that section 552.104 of the act is inapplicable here.

submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.⁴

We have examined the arguments submitted to us for review. We conclude that none of the respondents has made a *prima facie* case that the requested information constitutes trade secrets. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under the trade secrets branch of section 552.110 of the act.⁵

Next, we address the "commercial or financial information" branch of section 552.110. "Commercial or financial information" may be withheld from required public disclosure under section 552.110 if it is privileged or confidential by statute or judicial decision. One of the respondents argues that release of the requested information implicates the common-law privacy interests of the partners of a limited partnership. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* is of no legitimate concern to the public. *See* Open Records Decision No. 447 (1986) at 4.

⁴The 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, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

⁵Internal operating or business information, as well as technological processes or ideas, may constitute a trade secret. *See* R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* §§ 14.06, 14.09; "What is a 'trade secret' so as to render actionable under state law its use or disclosure by former employee," 59 A.L.R. 4th 641; *see, e.g., Gonzales v. Samora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi 1990, no writ) (evidence supported status of business procedures and forms as trade secrets). We have not found, nor have you referred us to, any judicial decision protecting a business' income statement, balance sheet, creditor information or general history as a trade secret.

The information in the application concerns a business entity, not an individual person. The "right of privacy is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests." Open Records Decision No. 192 (1978). Thus, information in the application does not directly invoke the test we have developed for financial information relating to an individual. In Open Records Decision No. 373 (1983) (copy enclosed), this office concluded:

In our opinion, all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

The financial statement of the limited partnership, as well as other financial information found in the file, is not the kind of personal financial information dealt with in Open Records Decision No. 373. In our opinion, financial information about the limited partnership does not constitute "highly intimate and embarrassing facts about . . . [an] individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 at 3. It may not be withheld as information protected by a common-law right of privacy.

The federal tax returns and the information within section 312.003 of the Tax Code must be withheld. The remainder of the information is available to the public.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/GCK/rho

Ref.: ID# 22048, ID# 22059, ID# 22238, ID# 22314, ID# 22343,
ID# 22437, ID# 22739, ID# 22846, ID# 23127, ID# 23166,
ID# 23167, ID# 23253, ID# 23281, ID# 23349, ID# 23350,
ID# 23362, ID# 23390

Enclosures: Open Records Decision No. 373
Submitted documents

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