



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

Mr. Dealey Herndon
Executive Director
State Preservation Board
P.O. Box 13286
Austin, Texas 78711

OR95-1175

Dear Mr. Herndon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34711.

The State Preservation Board (the "board") received a request for shop drawings of chairs C-1-C, an arm chair, and C-2-B and C-2-C, oak and walnut swivel chairs, from the Texas State Capitol. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. This office has previously concluded that a governmental body must be afforded the right to claim the "competitive advantage" aspect of section 552.104 where that governmental body is authorized by law or constitution to compete. Open Records Decision No. 593 (1991). In that opinion, we applied a two-pronged test in determining whether a governmental body could claim section 552.104 in these circumstances: (1) whether the governmental body is authorized by law or constitution to compete; and (2) whether release of the requested information could potentially cause specific harm to the legitimate marketplace interests of the governmental body. *Id.*

The board claims that it is specifically authorized by statute to market and sell gifts and souvenirs of the Capitol and is therefore entitled to claim the section 552.104 exception for the requested information. However, we find that release of the requested information, the shop drawings, would not potentially cause specific harm to the purported marketplace interests of the board.¹ The chairs that are the subject of the shop drawings are available for public inspection in the Capitol. Any member of the public can walk into the Capitol, photograph and measure the chairs. Therefore, even assuming that the board has specific statutory authority to compete, we do not believe that releasing the shop drawings will damage the board's purported competitive interest in the marketplace. Consequently, we conclude that the board may not withhold from disclosure the requested shop drawings under section 552.104.²

Section 552.110 excepts trade secrets from disclosure.³ The Texas Supreme Court has adopted the definition of "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.

¹As the board has not met the second prong of the test, we need not discuss whether the board is authorized by law to compete.

²The board claims that certain other information related to the chairs is also excepted from disclosure by sections 552.104 and 552.110. However, this information is not responsive to the request; the requestor seeks only the shop drawings.

³Section 552.110 also excepts from disclosure commercial or financial information obtained from a person that is confidential by statute or judicial decision. As this prong of the section 552.101 exception is not claimed here, we need not discuss it.

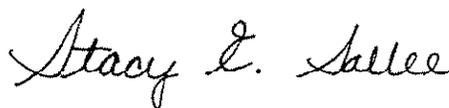
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).⁴

To be protected as a trade secret, information must be secret. *Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex. App.--Corpus Christi 1990, no writ); *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 276 (Tex. App.--Houston [1st Dist.] 1988, no writ); *Lamons Metal Gasket Co. v. Traylor*, 361 S.W.2d 211 (Tex. Civ. App.--Houston 1962, writ ref'd n.r.e.). As discussed above, the information contained on the shop drawings is not secret. Therefore, the shop drawings are not trade secrets and may not be withheld under section 552.110 of the Government Code.

As the drawings are copyrighted, any copying must be consistent with federal copyright law. *See* Attorney General Opinion JM-672 (1987) (custodian of public records must comply with copyright law and is not required to furnish copies of copyrighted records). If a member of the public wishes to make copies of copyrighted materials, 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). Whether or not the requestor is entitled to copy the requested information, he is entitled to inspect them under the Open Records Act. Open Records Decision No. 180 (1977).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

SES/rho

Ref.: ID# 34711

Enclosures: Submitted documents

cc: Mr. Randal B. Gilbert
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(w/o enclosures)