



August 6, 1999

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 East Eleventh Street
Austin, Texas 78701-2483

OR99-2200

Dear Ms. Soldano:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126521.

The Department of Transportation (the "department") received four requests for information pertaining to sign permits. You indicate that the information at issue may be private and may contain commercial information that is protected from disclosure under section 552.110 of the Government Code. You identified the companies whose property interests are at issue as J&J Outdoor Advertising (J&J) and Sign Ad, Inc. (Sign Ad). As provided by section 552.305 of the Public Information Act, this office provided these companies an opportunity to explain why the information requested should not be released. Sign Ad informed this office that the sign permit information at issue was not information submitted to the department by Sign Ad and also notified JGI Outdoor Advertising (JGI) of the request. Both J&J and JGI assert that the requested information is privileged and confidential and that the documents contain personal information about landowners that should not be released.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by constitutional or common-law privacy and under certain circumstances excepts from disclosure private facts about individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Details of transactions funded in whole or in part by the state are generally of legitimate public interest, because these are financial transactions that involve public funds. *See* Open Records Decision No. 545 (1990). However, there is no legitimate public interest in private financial decisions. Open Records Decision No. 600 (1992).

The permit information contains financial information about private individuals that is of no legitimate public interest and thus is protected from disclosure on the basis of common-law

privacy. We have marked this information as protected from disclosure. We note that only the financial information of the individual landowners is protected as private financial information. Open Records Decision No. 192 at 4 (1978) (right of privacy protects feelings of human beings, not property, business or other monetary interests). *See* Open Records Decision No. 373 at 3 (1983) (privacy interest in financial information relating to individual).

Section 552.110 provides an exception for “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” 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 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to

¹The 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 (1982), 306 (1982), 255 (1980).

the application of the trade secret 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). Neither J&J nor JGI has established that the records at issue are protected trade secrets.

The second prong of section 552.110 concerns commercial or financial information. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314796 (Tex. App.—Austin May 20, 1999, no pet. h.). Because J&J and JGI have not cited to a statute or judicial decision that makes the commercial or financial information privileged or confidential, the department may not withhold the requested information under section 552.110.

The department must withhold the information we have marked as confidential financial information. The remaining information must be released. We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/KHH/ch

Ref: ID# 126521

Encl. Submitted documents

cc: Ms. Phyllis O'Keeffe
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