



November 23, 1999

Mr. Hugh E. Davis
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102-6311

OR99-3364

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID129007.

The City of Ft. Worth (the "city") received a request for five categories of information related to City Secretary Contract No. 20565. You indicate that request items 3 and 5 will be provided to the requestor. The city invokes section 552.104 of the Government Code without supporting argument. The city also identifies third parties whose interests may be implicated by release of the responsive information.

Pursuant to Government Code section 552.305, we attempted to notify all identified third parties. Our notification provided the opportunity for each to submit its comments as to why an exception to public disclosure applies to any information they request be withheld. We were unable to contact the following firms at the provided addresses:

ADS Construction, Inc., Hinson, I.G. Hinson Construction, Fortuna General Services, Inc., American General Supplies Co. Inc., The Oyekan Group, Oyekan Construction, Ingram Excavation, and Texas Tech Construction, Inc.

A representative of B & H Utilities, Inc., Burleson Utilities, Inc., Cleburne Utility Construction Co., Inc., Davila Construction, Inc., Fu-Tech Construction, Inc., Howard Construction Company, Inc., Nadezda Construction, Inc., and Whizcon Utilities, Inc., submitted comments. Each of these firms asserts that its bonding capacity, bid limits, names of contacts and job locations are excepted from public disclosure as "trade secrets" under Government Code section 552.110. Each firm also raised section 552.101 in conjunction with rights of privacy and federal law, and section 552.104.

A representative of SCDP, Inc. responded, asserting that this company's data base and assessments, including the methods and procedures utilized to maintain and access this database, are excepted from disclosure as a "trade secret" under Government Code section 552.110.

Absent a showing that requested information is excepted from required public disclosure, we are unable to make a determination that some information may be withheld. Open Records Decision Nos. 639 (1996), 552 (1990). Therefore, all responsive information obtained from parties who did not provide comments indicating how an exception to public disclosure applies to the information obtained from that party, must be released unless made confidential by law. See Gov't Code § 552.021; See e.g. Open Records Decision Nos. 639 (1996), 552 (1990); *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. filed). We now address the exceptions claimed in response to this request.

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 other statutes. Title 26 section 6103(a) of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. § 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Our office has held that data collected by the Internal Revenue Service regarding a taxpayer's liability must be withheld. Open Records Decision No. 600 at 9 (1992). Therefore, the city must withhold all information submitted to the Internal Revenue Service as part of a tax filing, under section 552.101 in conjunction with title 26 section 6103(a) of the United States Code.

Section 552.101 of the Government Code also protects the common-law privacy rights of individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, a corporation or business entity may not claim common-law privacy as grounds for exception to public disclosure. Open Records Decision No. 600 (1982). Business interests are not protected by the common-law right of privacy. Open Records Decision Nos. 373 (1983), 192 (1978). As all of the implicated third parties are business entities, no responsive information may be withheld under section 552.101 in conjunction with the common-law right of privacy.

Section 552.104 of the Government Code protects competitive interests of governmental bodies in competitive bidding situations; this exception does not protect the interests of third parties who submit information to governmental bodies. Open Records Decision No. 592 at 8 (1991). The city has not provided any argument in support of this exception. Therefore, no responsive information may be withheld under Government Code section 552.104. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (permissive exceptions to disclosure may be waived by a governmental body).

Section 552.110 of the Government Code protects the property interests of those supplying information to governmental entities by excepting two types of information from disclosure: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code §552.110. 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

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). Open Records Decision No. 552 (1990).

The following criteria determines if information constitutes a trade secret:

(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, *supra*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if sufficient facts to establish a *prima facie* case that the information is a trade secret are alleged and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 at 5 (1990). In determining if a *prima facie* case has been established we look to the guidance of the United States Supreme Court, which holds:

Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. *Environmental Protection Agency v. Monsanto Co.*, 467 U.S. 986 (1984).

We find that the arguments submitted in support of the third parties' assertion of "trade secret" protection consist of mere conclusions and allege no facts regarding the degree to which the subject information is protected. We conclude that these arguments are not sufficient to establish a *prima facie* case that the subject information is a trade secret under the test articulated above. Therefore, no information may be withheld under the "trade secret" aspect of section 552.110 of the Government Code.

In summary, the tax filing information included in the responsive information must be withheld. The remaining information must be released. 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 regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 129007

Encl. Submitted documents

cc: Mr. Stephen Harris
Harrison, Steck Hoover & Drake, P.C.
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 7610
(w/o enclosures)

All third parties have been copied.