



October 28, 2002

Ms. Julie J. Gannaway  
Assistant City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

OR2002-6091

Dear Ms. Gannaway:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171247.

The City of Bryan (the "city") received a request for "current profit & loss statement and any financial records pertaining to La Salle Hotel for period of city ownership." You state that some responsive information has been released to the requestor. You claim that the submitted representative sample of information is excepted from disclosure under section 552.110 of the Government Code as proprietary or commercial and financial information of a third party.<sup>1</sup> In addition, pursuant to section 552.305, you indicate that you notified Lane Hospitality ("Lane"), the party with a proprietary interest in the information, of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

We first address the exception raised by the city. Section 552.110 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. *See* Gov't Code § 552.110(a), (b). 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). 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).<sup>2</sup> This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception 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). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

Upon review of the arguments you submitted to this office, we conclude that the city has not demonstrated how any of the submitted information is excepted from disclosure as either a trade secret under section 552.110(a) or as commercial or financial information under section 552.110(b).

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). Lane responded and

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<sup>2</sup>The 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 (1982), 306 at 2 (1982), 255 at 2 (1980).

claims that portions of the requested information are excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code.<sup>3</sup>

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Lane asserts that its financial information includes "private personnel information, including wages of employees of the hotel." We note that none of the submitted records contain wage or personnel information of individual employees. Based upon our review of the submitted records, we find that none of the information at issue is protected by common-law privacy. *See* Open Records Decision No. 620 (1993) (corporation has no common-law privacy interest in its financial information). Thus, no portion of the submitted information may be withheld under section 552.101 of the Government Code.

After reviewing the correspondence submitted by Lane, we conclude that Lane has not demonstrated that any of the submitted information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization

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<sup>3</sup>We note that Lane claims exceptions to the disclosure of its financial records, vendor agreements, pricing, rates, pricing/marketing strategies, projected capital expenditures, budgeted revenues and rates, potential new business, targeted customers, and employee wages. The city submitted a representative sample of financial records that does not contain information regarding pricing/marketing strategies, projected capital expenditures, potential new business, or targeted customers. This ruling does not address the information that was not submitted to this office.

and personnel, market studies, professional references, qualifications and experience, and pricing).

Lane claims that release of rate information would give its competitors an unfair competitive advantage in setting their own rate structures. We note, however, that release of information that can be relatively easily ascertained from other sources is unlikely to cause substantial competitive harm. *See* Open Records Decision No. 494 at 6 (1988) (citing *Braintree Electric Light Department v. Department of Energy*, 494 F. Supp. 287, 290 (D.D.C. 1980) (identities of customers purchasing fuel oil from specific company not confidential because trucks bearing company's logo were highly visible when making deliveries and because purchasers in oil industry are well known)). Generally, hotel rate information is easily ascertained from other sources. Therefore, to the extent that Lane's rates are easily ascertained from other sources, we conclude that rate information of the type contained in the submitted records may not be withheld from disclosure under section 552.110(b). However, to the extent that the rates contained in the requested records are not easily ascertained from other sources, the city must withhold that information under section 552.110(b) of the Government Code.

Lane also argues that release of its financial information would provide its competitors with specific knowledge of the operating budget for the hotel and its actual revenues and cost, thus undermining Lane's ability to compete in the Bryan/College Station area. Based upon Lane's representations, we find that release of the type of financial information that we have marked would likely result in substantial competitive harm to Lane. This type of information must, therefore, be withheld from public disclosure under section 552.110(b). None of the remaining submitted information is excepted from disclosure under section 552.110(b). *See id.* ("competitive harm" test requires balancing of public interest in disclosure with competitive injury to company in question). Therefore, the remaining submitted information must be released to the requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 171247

Enc. Submitted documents

c: **Ms. Jeannette Roman**  
508 East 30<sup>th</sup> Street  
Bryan, Texas 77803  
(w/o enclosures)

**Ms. Jennifer Rangel**  
General Counsel  
Lane Hospitality  
One Lane Hospitality Center  
1200 Shermer Road  
Northbrook, Illinois 60062  
(w/o enclosures)