



October 31, 2002

Mr. Alan J. Bojorquez  
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel  
1700 Frost Bank Plaza  
816 Congress Avenue  
Austin, Texas 78701-2443

OR2002-6213

Dear Mr. Bojorquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170850.

The Village of Bee Cave (the "village"), which you represent, received a request for information relating to the proposed bypass road for the Hill Country Galleria. You state that the village has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.107, 552.110, 552.111, and 552.131 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.<sup>1</sup>

We first address the village's arguments under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) excepts from disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

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<sup>1</sup>We note that the village also raised section 552.109, but submitted no arguments in support of this exception. Therefore, we do not address section 552.109. See Gov't Code § 552.301(e)(1)(A).

reflecting the village's policymaking process. Based on your representations and our review of the information in question, we conclude that you have demonstrated that section 552.111 encompasses some of the remaining information in Exhibit D and some of the information in Exhibit C. *See also* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). We have marked the information that is excepted from disclosure under section 552.111.

The village seeks to withhold the information submitted as Exhibit B under sections 552.110 and 552.131 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure 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 a "trade secret" from section 757 of the Restatement of Torts, 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) (emphasis added); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case

for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The village raises section 552.110(b). You state that Exhibit B contains commercial data that relates to a property developer's efforts to obtain zoning changes and economic development assistance. You assert that public release of this information would have an adverse impact on the developer's ability to negotiate prospective transactions with other private parties and the village. You also assert that, "[a]t this point, the Village's process would be unduly hindered if communications with the Village about sensitive commercial data were made public." We note that the impact on a governmental body of the release of information obtained from a private party is not a relevant consideration under section 552.110(b). See Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). We also note that the village did not solicit arguments from any private party to which the information in Exhibit B pertains. See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances). Having considered your arguments and reviewed the information in Exhibit B, we conclude that you have not made the required specific factual showing that the release of any information obtained from a private party would result in substantial competitive injury to that party. Therefore, the village may not withhold any of the information in Exhibit B under section 552.110(b).

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<sup>2</sup>The Restatement of Torts lists the following six factors as indicia of whether 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 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

The village also raises section 552.131 with respect to Exhibit B. This exception provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secrets" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." This aspect of section 552.131 is co-extensive with section 552.110. *See* Gov't Code § 552.110(a)-(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person.

You state that information in Exhibit B relates to ongoing economic development negotiations that involve the possibility of economic incentives being requested by certain parties. You have not established, however, that any information in Exhibit B qualifies as a trade secret of a business prospect or as commercial or financial information for which it

is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.131(a). Likewise, you have not shown that any information in Exhibit B relates to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Therefore, you have not demonstrated that any information in Exhibit B is excepted from disclosure under section 552.131 of the Government Code.

We note, however, that Exhibit B and the remaining information in Exhibits C and D contain private e-mail addresses. Section 552.137, which the Seventy-seventh Legislature added to chapter 552 of the Government Code, provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked private e-mail addresses that the village must withhold under section 552.137 unless the person to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.<sup>3</sup>

In summary, we have marked information that the village may withhold under sections 552.107 and 552.111 of the Government Code. The village must withhold the marked e-mail addresses under section 552.137 unless the person to whom a particular e-mail address belongs has affirmatively consented to its public disclosure. The rest of the submitted information is not excepted from disclosure and 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

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<sup>3</sup>You inform us that the village redacted "e-mail addresses of public citizens" from the information that was released to the requestor. We note that a governmental body must ask this office for a decision with regard to any information, including an e-mail address, that it believes is excepted from public disclosure. *See* Gov't Code §§ 552.301, .302.

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,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a horizontal line extending to the right from the end of the signature.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 170850

Enc: Marked documents

c: Ms. Pat Sinnott  
3506 Normandy Ridge  
Austin, Texas 78738  
(w/o enclosures)