



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

March 20, 2003

Ms. Camila W. Kunau  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2003-1928

Dear Ms. Kunau:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177482.

The City of San Antonio (the "city") received a request for "access to all files for [Tax Increment Financing ("TIF")] projects overseen by NAD . . . [including] current, past, and dissolved TIFs." You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state that the release of the submitted information may implicate the proprietary rights of eighteen developers. Consequently, you notified these developers of the request for information under section 552.305 of the Government Code. We have received briefing from Big Fish Development Two, Three and Five, L.L.C. ("Big Fish"), En Seguido, Ltd. ("En Seguido"), West Pond, Ltd. ("West Pond"), Sunshine Homes, Inc. ("Sunshine Homes"), Vise Oaks I, Ltd. ("Vise Oaks"), Lackland Hills Joint Venture ("Lackland Hills"), and Gordon V. Hartman Enterprises, Inc. ("Hartman Enterprises"), in which these parties contend that information pertaining to them is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered all claimed exceptions and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

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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.

The city asserts that some of the submitted information is excepted from disclosure under section 552.104. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990). In this case, you inform this office that disclosure of the submitted information “may cause the City to lose the ability to obtain TIF applications in the future.” After reviewing your arguments and the submitted information, we find that the city has not demonstrated potential harm to its interests in any particular competitive situation. *See* ORD 463. Accordingly, you may not withhold any of the submitted information under section 552.104.

We note that Lackland Hills asserts that it would not have disclosed its information had it envisioned this information being subject to public review. We also note that some of Lackland Hills information has been designated as confidential. However, information is not confidential under the Public Information Act (the “Act”) merely because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); *but see* Open Records Decision No. 284 (1981) (letters of recommendation submitted pursuant to express contracts of confidentiality prior to 1973, when Open Records Act was enacted, are enforceable). Consequently, unless the information at issue falls within an exception to disclosure, the information must be released, notwithstanding any agreement specifying otherwise.

West Pond argues that its information is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), dismissed in part, *aff’d* in part, vacated in part, and remanded, 993 F.2d 1111 (4th Cir. 1993). We therefore find that the city must withhold the submitted information pertaining to West Pond under section 552.101 in conjunction with federal law. As we base our conclusion on section 552.101, we need not address West Pond’s remaining argument for this information.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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. With respect to the trade secret prong of section 552.110, we note that 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. *Id.*<sup>2</sup> This office has held that if a governmental body takes no position with regard to 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). With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); see Open Records Decision No. 661 (1999).

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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).

The city asserts that the submitted information is excepted under section 552.110 because the release of the submitted information “may cause the City to lose the ability to obtain TIF applications in the future” and would “interfere with the City’s bargaining power.” After reviewing the city’s arguments and the submitted information, we find that the city has failed to demonstrate the applicability of either prong of section 552.110 to the submitted information.

Next, we turn to the third parties’ arguments that portions of the requested information are excepted from disclosure under section 552.110. Big Fish, En Seguido, Sunshine Homes, Vise Oaks, and Hartman Enterprises contend that the public release of their financial statements would result in substantial competitive harm. Based on these third parties’ arguments and our review of the submitted financial statements, we find that Big Fish, En Seguido, Sunshine Homes, Vise Oaks, and Hartman Enterprises have demonstrated that the public release of their financial statements would cause them substantial competitive harm. Accordingly, the city must withhold this information from required public disclosure under section 552.110(b).<sup>3</sup> After reviewing Lackland Hills’s arguments, however, we find that Lackland Hills has failed to demonstrate the applicability of section 552.110 to its information.

We note that although the remaining developers were notified pursuant to section 552.305 of the Government Code, they have not provided this office with any arguments. Therefore, we have no basis to conclude that their information is protected proprietary information. See Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

However, we note that portions of the submitted information not otherwise excepted under sections 552.101 and 552.110 are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that “[a]n 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 [the Act].” Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the city must withhold the e-mail addresses in the submitted information, a representative sample of which we have marked under section 552.137.<sup>4</sup>

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<sup>3</sup>As we base our ruling on section 552.110, we need not address the arguments of some of the third parties that portions of the financial statements are excepted from disclosure under section 552.101.

<sup>4</sup>We note that section 552.137 does not apply to a government employee’s work e-mail address, the general e-mail address of a business, nor to a web site or web page.

Finally, we note that some of the materials are indicated to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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).

In summary, the city must withhold from disclosure the financial statement of West Pond under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. The city must withhold the financial statements of Big Fish, En Seguido, Sunshine Homes, Wise Oaks, and Hartman Enterprises based on section 552.110(b) of the Government Code. E-mail addresses of members of the public in the submitted information must be withheld under section 552.137. The remaining submitted information must be released to the requestor in accordance with federal copyright law.

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 Dep't of Pub. 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,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 177842

Enc: Submitted documents

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