ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2004

Mr. Matthew C. G. Boyle
Assistant City Attorney
City of Grapevine
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2004-8700

Dear Mr. Boyle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211008.

The City of Grapevine (the "city"), which you represent, received a request for any proposal submitted to the city requesting funding for UnderWater World at Grapevine, any analysis or projections related to the project, name of any outside organization which analyzed the project, and any similar documents for the Ripley aquarium project. You indicate that the city has released some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.110 and 552.131 of the Government Code. Additionally, you state, and provide documentation showing, that you have notified the potential developer, U.S. Aquarium Team, Inc., ("Aquarium") of this request and of its right to submit comments as to why information pertaining to it should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act ("Act") in certain circumstances). We have received correspondence from Aquarium in which Aquarium objects to the release of the submitted information based on sections 552.110 and 552.131 of the Government Code. We have considered all submitted arguments and reviewed the information submitted by the city.

Section 552.110 protects the proprietary 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 in formation was obtained. *See* Gov't Code § 552.110.

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.); *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 com pound, 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.[1] *Id.* 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 the exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition

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[1]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).

of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial 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[.]" Gov't Code § 552.110(b). Section 552.110(b) 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 N o. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The city raises both subsections of section 552.110, while the Aquarium raises only section 552.110(b). We note that, by its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Accordingly, we find that the city has failed to establish the applicability of section 552.110. Furthermore, we find that the Aquarium has failed to demonstrate that the submitted information constitutes commercial or financial information, the release of which would cause the Aquarium substantial competitive harm. *See* Gov't Code § 552.110(b). Accordingly, none of the submitted information may be withheld under section 552.110.

Section 552.131 of the Government Code relates to economic development information and provides in part:

> (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].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). We further note that section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. 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. *See id.* Section 552.131(b), on the other hand, is designed to protect the interests of governmental bodies, not third parties.

After reviewing the submitted information, we conclude that the submitted information does not contain or consist of a financial or other incentive being offered to the business prospect. Further, after reviewing the Aquarium's arguments and the submitted information, we find that the Aquarium has failed to adequately demonstrate that any portion of the submitted information is excepted from disclosure as a trade secret of a business prospect or as commercial or financial information the release of which would cause substantial competitive harm to the person from whom the information was obtained. We, therefore, conclude that the city may not withhold any portion of the submitted information under section 552.131 of the Government Code.

Because there are no other claimed exceptions, we conclude the submitted information must be released.

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).

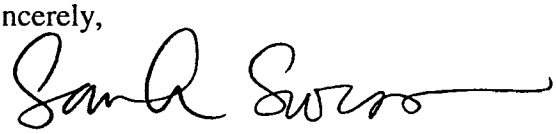
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 211008

Enc. Submitted documents

c: Ms. Ellena Morrison
Star-Telegram/Northeast
P. O. Box 915007
Fort Worth, Texas 76115
(w/o enclosures)

Mr. Thomas Allen Moon
15615 Preston Road #1012
Dallas, Texas 75248
(w/o enclosures)

Mr. Erik O. Pedersen
U.S. Aquarium Team, Inc.
c/o Mr. Matthew C. G. Boyle
Assistant City Attorney
City of Grapevine
4201 Wingren, Suite 108
Irving, Texas 75062-2763
(w/o enclosures)