ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 21, 2005

Ms. Susan K. Bohn
Bracewell & Patterson, LLP
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2005-03454

Dear Ms. Bohn:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 222455.

The Spring Independent School District (the "district"), which you represent, received a request for "information on [the district's] 457 plan including but not limited to: Investment Company, investment options, administrative charges, and other fees or expenses associated with account(s)." You assert that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code, but make no arguments regarding these exceptions. Instead, pursuant to section 552.305(d) of the Government Code, you have notified the financial corporation that manages the district's 457 plan, First Financial Group of America ("First Financial") of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that 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 in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge that the district has not sought an open records decision from this office within ten business days as required by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). In addition, you failed to submit, within fifteen business days, a copy, or representative sample, of the specific information at issue as required by section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e)(1)(A), (D). The district's delay in this matter results in the presumption that the requested information is

public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We will therefore consider whether any of the submitted information must be withheld to protect third party interests.

First Financial raises section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). As First Financial acknowledges, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to Gov't Code § 552.104 is designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). First Financial argues that the district "has specifically requested that this office analyze section 552.104 and issue an opinion consistent with the [d]istrict's withholding of the requested materials." Although we agree that the district raises section 552.104, we note that it has failed to timely request a ruling as required by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). Therefore, by failing to timely request a ruling, the district has waived section 552.104. *See* Open Records Decision No. 592 (1991) (stating that governmental body may waive Gov't Code § 552.104). Accordingly, we conclude that the district may not withhold any portion of the submitted information under section 552.104 of the Government Code.

First Financial also raises section 552.110 of the Government Code for the submitted information. 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." 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a 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 person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.[1] *See* Open Records Decision No. 552 at 5 (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. 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). This exception to disclosure 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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

After carefully reviewing the arguments presented to us by First Financial and the submitted information, we determine that First Financial has not demonstrated that any portion of the

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[1]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).

submitted information meets the definition of a trade secret, nor has First Financial demonstrated the necessary factors to establish a trade secret claim for the information. We therefore determine that no portion of the submitted information is excepted from disclosure under section 552.110(a). Furthermore, we conclude that First Financial has failed to demonstrate that any of the submitted information constitutes commercial or financial information, the release of which would cause First Financial substantial competitive harm. Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6 (1999); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Accordingly, the district may not withhold any of the submitted information pursuant to section 552.110 of the Government Code. As First Financial raises no further exceptions to disclosure, and the information is not confidential by law, the district must release the submitted information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

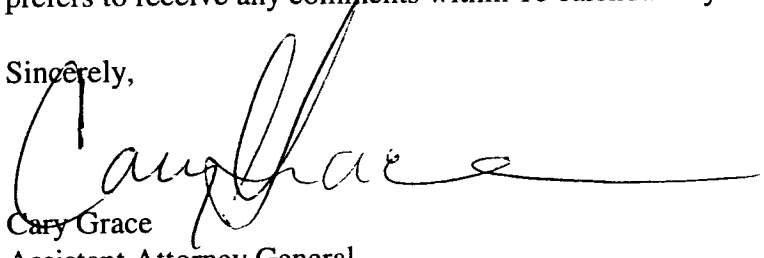
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath* , 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Cary Grace
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ECG/LEK/krl

Ref: ID# 222455

Enc. Submitted documents

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