ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 10, 2007

Ms. Moira Schilke
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2007-00425

Dear Ms. Schilke:

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# 268876.

Dallas County (the "county") received two requests for information pertaining to Keefe Commissary Network ("Keefe"). While you take no position on the disclosure of the information you have submitted for review, you state that release of this information may implicate the proprietary interests of third party Keefe. Accordingly, you state, and provide documentation showing, that you notified Keefe of the two requests and its right to submit arguments to this office as to why the information 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 the Act in certain circumstances). Our office has received correspondence from Keefe. We have considered all claimed exceptions and reviewed the submitted information.

Initially, we note that you have only submitted a letter and a financial statement for our review. As you have not submitted the county jail's commissary contract or Keefe's bid proposal for our review, we assume you have released this information to the extent that it existed at the time this request was received. If you have not released any such records, you must release them at this time. *See* Gov't Code §§ 552.301(a), .302.; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions

apply to requested information, it must release information as soon as possible under circumstances).

Next, we address the county's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The county received the first request for information on October 26, 2006. However, the county did not request a decision regarding this request until November 10, 2006. Accordingly, the county failed to meet the deadlines prescribed by section 552.301(b) with regard to the first request, and this information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, third party interests are at stake. Therefore, we will address Keefe's arguments against disclosure.

We first address Keefe's contention that the submitted letter is excepted from disclosure because "it was not part of the actual documentation required in the bid, but was submitted to the county with the understanding of both parties that the information was supplemental and private[.]" We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

While Keefe has submitted arguments under sections 552.103, 552.104, 552.107, and 552.108 of the Government Code for the submitted information, the county takes no position

with respect to the public availability of the submitted information.[1] A governmental body has the discretion to assert that information requested under the Act is excepted from release under sections 552.103, 552.104, 552.107, and 552.108 of the Government Code. *See* Gov't Code § 552.007; Open Records Decision No. 549 at 6 (1990). Since these sections are discretionary exceptions that only protect the governmental body's interests, they may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 592 at 8-9 (1991) (contention of competitive harm under section 552.104 may be waived), 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 may be waived), 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 may be waived), 586 (1991) (governmental body may waive section 552.108), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). The county does not assert that the submitted information is excepted under section 552.103, 552.104, 552.107, or 552.108; therefore, the information may not be withheld pursuant to any of these sections.

Keefe also contends that the financial statements the county has submitted are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). 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

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[1] Although Keefe believes the submitted letter is excepted by the attorney-client privilege under Texas Rules of Evidence 503, we note that section 552.107 is the proper exception to raise for its attorney -client privilege claim in this instance. *See* Open Records Decision No. 676 (1988).

> 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). There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
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> (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 to [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing this information; and
>
> (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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption 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).

Section 552.110(b) protects "[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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

In this instance, we find that Keefe has not demonstrated how any of its information meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). Accordingly, the information at issue may not be withheld under section 552.110(a). We also find that Keefe has not established that the release of its financial information would cause it substantial competitive harm; therefore, the county may not withhold this information under section 552.110(b). As no other exceptions to disclosure have been raised, 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, 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); *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 Office of the Attorney General 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. 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,

Gilbert N. Saenz
Assistant Attorney General
Open Records Division

GNS/sdk

Ref: ID# 268876

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