



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2007

Mr. Matthew D. de Ferranti
Bovey Bojorquez, LLP
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2007-07921

Dear Mr. de Ferranti:

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# 282965.

The City of Brady (the "city"), which you represent, received a request for all minutes and financial statements involving the Brady Economic Development Corporation ("Brady EDC") and the current loan and rental status held by the Brady EDC. You state that you have released a portion of the requested information. You claim that portions of the remaining information are excepted from disclosure under sections 552.103, 552.110, and 552.131 of the Government Code.¹ You also indicate that releasing the remaining information may implicate the interests of third parties. Accordingly, you have notified the interested third parties of the request and of their opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

¹You also raises sections 552.101, 552.107, and 552.305 of the Government Code. You do not explain how sections 552.101 and 552.107 apply to the submitted information. Therefore, the city may not withhold any information under sections 552.101 and 552.107. Gov't Code §§ 552.301, .302. Additionally, we note that section 552.305 is not an exception to disclosure. *See id.* § 552.305. Section 552.305 addresses the procedural requirements for notifying third parties that their interests may be affected by a request for information. *See id.*

Initially, we note that Exhibit C is not responsive to this request because it does not involve loans held by the Brady EDC. The city need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, a portion of the requested information consists of minutes of open meetings. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the “minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body’s chief administrative officer or the officer’s designee.” Gov’t Code § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). However, minutes of a closed meeting are confidential. Gov’t Code § 551.104; *see* Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under Open Meetings Act), 495 (1988) (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). You state that the Brady EDC had no reason to adjourn to executive sessions to discuss the matters you have marked in the submitted minutes because there were no attendees. Regardless of whether there were attendants at the meetings at issue, these meetings were still open meetings subject to the Open Meetings Act. Therefore, the city may not withhold the information you have marked in the meeting minutes under any of the claimed exceptions and it must release this information to the requestor.²

An interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). In your brief to our office, you notify us that you sent notice to private parties whose interests may be implicated. However, you do not provide us with the names of these private parties. As of the date of this letter, we have received comments from Moreno’s Auto and Transmission Repair (“Moreno’s”), Back at the Ranch (“Ranch”), and Tim Grimes Motor Trike (“Grimes”) explaining why the requested information should not be released. To the extent notice was sent to any other private parties, we have no basis to conclude that they have protected proprietary interests in any of the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

²As our ruling is dispositive, we will not address the exceptions you claimed for this information.

You claim that portions of the information in Exhibit D are excepted from disclosure under 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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;
- (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* ORD 232. 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. ORD 552. 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. *Id.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

You state that release of portions of the information, which you have marked, in Exhibit D would harm the businesses in question. Moreno’s argues that releasing its financial information could put it out of business. Ranch states that it is in direct competition with the requestor and it does not permit the release of any information relating to private financial records. Grimes also objects to the release of its financial information. Upon review of the submitted information and arguments, however, we find that only generalized allegations have been made. The parties did not provide specific factual evidence demonstrating that release of any of the marked submitted information would result in substantial competitive harm to the companies. *See* Open Records Decision No. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). In addition, you and the responding third parties have failed to demonstrate that any portion of the information is protected as a trade secret. Accordingly, we determine that none of submitted information you have marked is excepted from disclosure under section 552.110. Thus, the city may not withhold this information under section 552.110 of the Government Code.

You also claim section 552.103 for the information that you have marked in Exhibit D. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The city has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden the city must show that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state that a portion of the marked information in Exhibit D may result in litigation in the future because of an improper lease. You have failed to submit any evidence that any concrete steps towards litigation have been taken. Therefore, you have failed to demonstrate that litigation was reasonably anticipated when the present request for information was

received. Therefore, the city may not withhold any of the information you have marked in Exhibit D under section 552.103. As you raise no other arguments against disclosure of this information, it 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 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).

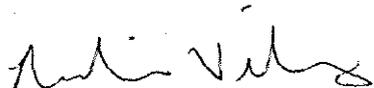
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read 'Melanie J. Villars', written in a cursive style.

Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jb

Ref: ID# 282965

Enc. Submitted documents

c: Mr. Bill Ricks
1105 South Bridge Street
Brady, Texas 76825
(w/o enclosures)