



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2007

Mr. John Knight
Senior Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2007-09492

Dear Mr. Knight:

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# 284815.

The City of Denton (the "city") received a request for information relating to tax breaks or other economic incentives involving Allegiance Development, LP ("Allegiance"), Feldman Mall Properties ("Feldman"), and the Rayzor Ranch development. You claim that the requested information is excepted from disclosure under sections 552.110 and 552.131 of the Government Code. You also believe that this request for information implicates the interests of Allegiance and Feldman. You notified Allegiance and Feldman of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from an attorney for Allegiance. We have considered all of the submitted arguments and have reviewed the information you submitted.

We first note that the submitted information that relates to Allegiance was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2007-09460 (2007). You do not indicate that there has been any change in the law, facts,

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

and circumstances on which the previous ruling is based. We therefore conclude that the city must dispose of the submitted information that relates to Allegiance in accordance with Open Records Letter No. 2007-09460.² *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Feldman. Thus, because Feldman has not demonstrated that any of its information is confidential or proprietary for the purposes of the Act, the city may not withhold any of Feldman's information on the basis of any interest that Feldman may claim in that information. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Lastly, we consider the city's claims under sections 552.110 and 552.131 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to 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.

²As we are able to make this determination, we need not address the arguments that we received from Allegiance.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid 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.³ *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 claim. *See* Open Records Decision No. 402 (1983).

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 No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

You state that the submitted information that is related to Feldman contains confidential *commercial and financial information* and concerns an economic development incentive. You argue that disclosure of the information in question would cause substantial harm to the city by providing crucial insights into its legal strategies and risk tolerance. You also contend that release of the information in question would cause substantial competitive harm to Feldman. Thus, we understand you to claim section 552.110(b). Having considered your arguments, we conclude that you have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information that is related to Feldman would result in substantial competitive injury. *See* ORD 661 at 5-6. We therefore conclude that the city may not withhold any of Feldman’s information under section 552.110 of the Government Code.

Section 552.131 relates to economic development information and provides in part:

³The 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).

(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(a)-(b). 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.* Thus, the protection provided by section 552.131(a) is co-extensive with section 552.110. *See id.* § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6.

You also seek to withhold information relating to Feldman under section 552.131. Because neither Feldman nor the city has demonstrated that any of the information in question qualifies as a trade secret under section 552.110(a), the city may not withhold any of Feldman's information under section 552.131(a)(1). Likewise, because neither Feldman nor the city has shown that section 552.110(b) is applicable to any of Feldman's information, the city may not withhold any of the Feldman's information under section 552.131(a)(2).

Section 552.131(b) protects information relating to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See* Gov't Code § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not those of third parties. Although you contend that the information relating to Feldman concerns an economic development incentive, you have not demonstrated that the information in question reveals any financial or other incentive that the city is offering to a business prospect. We therefore conclude that the city may not withhold any of Feldman's information under section 552.131(b).

In summary, the city must dispose of the submitted information that relates to Allegiance in accordance with Open Records Letter No. 2007-09460. The rest of 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).

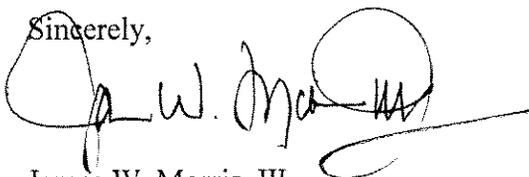
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 284815

Enc: Submitted documents

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