ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2008

Ms. Yvette Aguilar
Assistant City Attorney
City of Corpus Christi
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OR2008-07878

Dear Ms. Aguilar:

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# 312640.

The City of Corpus Christi (the "city") received a request for building permit and construction documents for projects given permit numbers 0700007108, 0700007429, 0700007702, 0700007903, 0700007990, and 0700008145, as well as certain correspondence related to the projects.[1] You state that you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. While you also raise section 552.110 of the Government Code as a possible exception to disclosure, you take no position with respect to the applicability of this exception. You indicate that the release of the information at issue may implicate the proprietary interests of third parties. You state, and provide documentation showing, that you have notified the following third parties of the request and of each companies opportunity to submit arguments to this office: Urban Engineering; Don Huff & Associates; NRG Engineering; R.W. Stone Engineer, P.L.L.C.; NCA Architecture; Millett Engineering Group; E/B/E Inc.; Gignac Landscape Architecture;

[1]We note that the requestor excluded from her request social security numbers, driver's license numbers, geological information, and certain financial information. Accordingly, any such information is not responsive to the request and need not be released to the requestor.

RIVA Architects, L.L.C. ("RIVA"); Muermann Engineering; Bass & Welsh Engineering; Jack in the Box, Inc. ("JIB"); Edwards & Kelcey; Evergreen Design Group, Inc.; TLD Architects, Inc. ("TLD"); BGA Engineers, Inc.; Lippe and Associates Consulting Engineers; and Furniture Row USA, L.L.C.. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from representatives of JIB, RIVA, and TLD. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the city's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement or sufficient evidence showing the date the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You inform us that the city received this request on March 26, 2008. However, you did not submit arguments or the information at issue until April 21, 2008. Consequently, we find that the city failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.137 of the Government Code can provide a compelling reason to withhold information and third-party interests are at stake, we will consider the submitted arguments.

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. Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has only received

comments from JIB, RIVA, and TDL.[2] Thus, we have no basis to conclude that the release of any portion of the submitted information relating to the other third parties would implicate their proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

JIB and TDL each raise section 552.110 of the Government Code for their submitted information. 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. 1957); *see also* ORD 552 at 2. 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 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 Huffines*, 314 S.W.2d at 776. 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.[3] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable

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[2]We note that RIVA does not object to the release of any information related to it.

[3]The following are the six factors that the Restatement gives 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 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).

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).

JIB asserts that its submitted plans and drawings indicate common design elements exhibited by all JIB restaurants, and therefore, are for continuous use in JIB's restaurant business. TDL also asserts that the submitted plans related to its client, Academy, indicate common design elements exhibited by all Academy stores. JIB and TDL have also demonstrated to this office how the submitted plans related to them meet the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939). Therefore, after reviewing the arguments and the information at issue, we conclude that JIB and TDL have each established a *prima facie* case that the submitted plans and drawings are a trade secret. *See Taco Cabana Int'l v. Two Pesos*, 932 F.2d 1113, 1123-1125; *see also American Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 278 (Tex.App.—Houston [1st Dist.] 1988, no writ) (blueprints, drawings, and customer lists constitute trade secrets); *Ecolaire Inc. v. Crissman*, 542 F.Supp. 196, 206 (E.D.Pa.1982) (drawings, blueprints, and lists constitute trade secrets because such information could be obtained, through other than improper means, only with difficulty and delay). Accordingly, the city must withhold the information related to JIB, Rolls 3, 5, 6, and 8, under section 552.110(a). The city must also withhold the information related to TDL, Roll 1, under section 552.110(a).[4]

The city raises section 552.137 of the Government Code for portions of the remaining information. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The marked e-mail addresses found in the remaining information are not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses you have marked, as well as the additional e-mail addresses we have marked, in accordance with section 552.137 unless the city receives consent for their release.

The city also argues that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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[4]As our ruling is dispositive, we need not address JIB's or TDL's arguments under section 552.110(b) of the Government Code.

In summary, the city must withhold the information related to JIB and TDL under section 552.110(a) of the Government Code. The marked e-mail addresses must be withheld under section 552.137 of the Government Code unless the city receives consent for their release. The remaining information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

Jordan Hale

Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 312640

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