



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2009

Mr. Ben L. Stool
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2009-06045

Dear Mr. Stool:

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# 342148.

The Dallas County Constable, Precinct 3 (the "constable"), which we understand you to represent, received a request for the following information: (1) all traffic citations issued by a named officer on a particular date; (2) the FCC license to operate a laser unit; (3) the manufacturer's manual and specifications related to a laser unit; and (4) repair records for the laser unit. You state that the constable has no information responsive to items two and four of the request.¹ You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. You also assert that the requested manual is subject to federal copyright law. Further, because you believe that the release of some of the submitted information may affect the proprietary interests of an interested third party, Laser Technology, Inc. ("LTI"), you state that, pursuant to section 552.305 of the Government Code, you notified LTI of the request and of 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 Act in certain

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

circumstances). We have received comments from LTI. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

The constable seeks to withhold the information at issue under section 552.103 of the Government Code, which provides in relevant part 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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and have provided documentation showing, that prior to the constable's receipt of the request for information, Case Number JT08-43364-N was filed in the Justice Court for Precinct 3 in Dallas County. We note, however, that the constable is not a party to this litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have not provided such a representation from the Office of the District Attorney (the "district attorney"). In fact, you state only that the requestor "seeks to use the requested records in her defense [and] to circumvent the procedures [regarding] discovery in criminal cases." Thus, as you have not established that the constable is a party to this litigation or provided a representation from the district attorney that the district attorney has a litigation interest in the information at issue, we find that the constable has failed to demonstrate that section 552.103 is applicable. Therefore, the constable may not withhold the information at issue under section 552.103 of the Government Code.

LTI states that the requested operator's manual is a copyrighted publication that is available for purchase by the requestor from LTI. Section 552.027 of the Government Code provides that a governmental body is not required under the Act to allow the inspection of information in a commercial publication purchased or acquired by the governmental body for research purposes if the publication is commercially available to the public. *See Gov't Code § 552.027(a)*. Accordingly, based upon LTI's representations, we conclude that such commercially available information falls within the scope of section 552.027 and need not be released to the requestor.

LTI asserts that the requested laser unit manufacturer's specification are trade secrets of the company which are protected under section 552.110 of the Government Code. 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.); Open Records Decision Nos. 552 at 2 (1990), 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; *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255, 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).

We note that LTI has made the specifications which it seeks to withhold publicly available on its website. Thus, LTI has failed to demonstrate that the information it publishes on its website is a trade secret. Therefore, the submitted specifications may not be withheld under section 552.110 of the Government Code.³

We note that some of the submitted information must be withheld under section 552.130 of the Government Code, which excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code § 552.130(a)(1). We have marked the information that must be withheld under

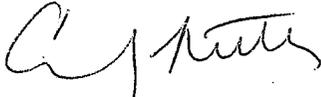
³As the constable has informed this office that it has no information responsive to the portion of the request for "laser unit repair records[,] we do not address LTI's arguments regarding disclosure of this information.

section 552.130. With the exception of the commercially available manual, the remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 342148

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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