



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 19, 2009

Ms. Myrna S. Reingold  
Galveston County Legal Department  
722 Moody, 5<sup>th</sup> Floor  
Galveston, Texas 77550-2317

OR2009-06817

Dear Ms. Reingold:

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# 343781.

The Galveston County Office of Emergency Management (the "county") received a request for information relating to the Bolivar Peninsula project, including the proposals received by the county. You state some of the requested information has been released.<sup>1</sup> You take no position on the public availability of the rest of the requested information. You believe, however, that the remaining information may implicate the interests of AshBritt, Inc., Crowder-Gulf Joint Venture, L.L.P., Phillips & Jordan, Inc., and Storm Reconstruction Services, Inc. You notified the interested parties 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.<sup>2</sup> We received correspondence from an attorney for Phillips & Jordan ("P&J"). We

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<sup>1</sup>You inform us that the information released by the county includes a copy of its executed contract with the winning bidder. You explain that the county did not understand that the request encompasses the contract until you received subsequent correspondence from the requestor.

<sup>2</sup>See 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).

also received comments from an attorney for the requestor.<sup>3</sup> We have considered all of the submitted arguments and reviewed the submitted information.

We first note, and you acknowledge, that the county did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e) (providing deadlines for submission of request for attorney general's decision under Act). The submitted information is therefore 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). This statutory presumption can generally be overcome when 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). Therefore, we will determine whether the county must withhold any of the submitted information to protect the third parties' interests.

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, only P&J has submitted any arguments against disclosure of the submitted information. Thus, because none of the other third parties has demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act, the county may not withhold any of their information on either of those grounds. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

P&J claims exceptions to disclosure of most of its information under sections 552.110 and 552.131 of the Government Code. We begin with section 552.110, which protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” 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.” Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas 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

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<sup>3</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

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 . . . [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) (emphasis added); *see 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.<sup>4</sup> *See* ORD 552 at 5. 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

P&J claims that most of its information constitutes a trade secret. P&J also contends that section 552.110(b) is applicable to the information in question. Having considered P&J's arguments and reviewed the information in question, we conclude that the county must

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<sup>4</sup>The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

withhold P&J's pricing information, which we have marked, under section 552.110(b). We find that P&J has not demonstrated that any of the remaining information at issue constitutes a trade secret of the company under section 552.110(a). We also find that P&J has not provided the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause P&J substantial competitive harm. We therefore conclude that the county may not withhold any of the remaining information relating to P&J under section 552.110. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

P&J also raises section 552.131(a) of the Government Code, which provides as follows:

(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.

Gov't Code § 552.131(a). 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 that afforded by section 552.110. *See id.* § 552.110(a)-(b); ORD 552, 661. P&J claims that section 552.131(a) is applicable to the remaining information at issue. We note, however, that P&J's proposal to the county is related to the removal of debris caused by Hurricane Ike rather than to economic development negotiations. Moreover, P&J has not demonstrated that any of the remaining information at issue either constitutes a trade secret under section 552.110(a) or falls within the scope of section 552.110(b). We therefore conclude that the county may not withhold any of the remaining information at issue under section 552.131 of the Government Code.

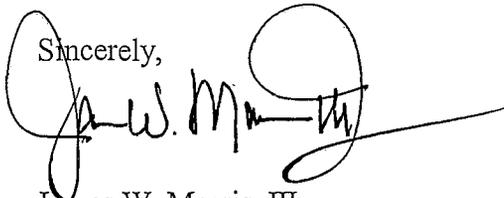
Lastly, we note that some of the submitted information that is not excepted from disclosure appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the county must withhold the information relating to P&J that we have marked under section 552.110 of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

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](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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

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

JWM/cc

Ref: ID# 343781

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

Mr. John W. Noble  
Mr. Terry M. Jackson  
AshBritt, Inc.  
480 South Andrews Avenue Suite 103  
Pompano Beach, Florida 33069  
(w/o enclosures)

Mr. John Ramsay  
CrowderGulf Joint Venture, L.L.P.  
5435 Business Parkway  
Theodore, Alabama 36582  
(w/o enclosures)

Mr. John West  
Mr. Edd Satterfield  
Phillips & Jordan, Inc.  
224 St. Landry Street Suite 3-E  
Lafayette, Louisiana 70501  
(w/o enclosures)

Mr. Ron Crump  
Storm Reconstruction Services, Inc.  
1444 West I-65 Service Road South  
Mobile, Alabama 36693  
(w/o enclosures)

Ms. Kimberly M. Bawgus  
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC  
420 Twentieth Street North Suite 1600  
Birmingham, Alabama 35203  
(w/o enclosures)

Mr. Shaun W. Hodge  
Hodge Law Firm, LLC  
2211 The Strand Suite 201  
Galveston, Texas 77550  
(w/o enclosures)