



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2009

Mr. George E. Hyde
Denton, Navarro, Rocha & Bernal
For City of Windcrest
2517 North Main Avenue
San Antonio, Texas 78212

OR2009-17604

Dear Mr. Hyde:

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# 364151.

The City of Windcrest (the "city"), which you represent, received a request for all documents that were considered, approved, or resulted from a specified meeting, as well as specified agreements.¹ You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, and 552.131 of the Government Code. You also state the release of the submitted information may implicate the proprietary interests of RHYA Development Partners, LLC ("RHYA"); Urban Revitalization Real Estate Group, LLC ("Urban"); and Windcrest Economic Development Company, LLC ("Windcrest"). Accordingly, you state, and provide documentation showing, that the city notified RHYA, Urban, and Windcrest of the request and of their right to submit arguments stating why their 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 the Act in certain circumstances).* We have considered the

¹We note that the city asked for and received clarification regarding this request. *See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).*

exceptions you claim and reviewed the submitted information. We have also received comments from RHYA and Urban.

Initially, we note that 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Windcrest has not submitted to this office any reasons explaining why the submitted information should not be released. Thus, we have no basis for concluding that any portion of the submitted information constitutes proprietary information of Windcrest, and the city may not withhold any portion of the submitted information on that basis. *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.

We next note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in-part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information consists of development agreements relating to the receipt or expenditure of public funds by the city that are subject to subsection 552.022(a)(3). The city must release this information unless it is expressly confidential under other law. Although you raise sections 552.103 and 552.131(b) of the Government Code, these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, sections 552.103 and 552.131(b) are not "other law" that make information confidential for the purposes of section 552.022. Although RHYA and Urban also raise section 552.103, this provision may only be raised by a governmental body and not private parties. *See* Open Records Decision Nos. 575 at 2 (1990), 551 at 3 (1990)

(section 552.103 enables governmental entities to protect their position in litigation), 542 at 4 (litigation exception does not implicate third-party rights and may be waived by governmental body). Therefore, the city may not withhold the submitted information under these sections. However, because information that is subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claims under this exception. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). We will also consider whether the submitted information is confidential under sections 552.101, 552.110, or 552.131(a) of the Government Code because these sections constitute "other law" for the purposes of section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). You indicate that the submitted information consists of financial information. However, we note that common-law privacy protects the interests of individuals, not those of governmental or business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). In this instance, we note that the information at issue pertains only to financial matters between economic development companies and the city. Thus, we conclude that common-law privacy is not applicable to any of the information at issue, and it may not be withheld under section 552.101 on this basis.

The city, RHYA, and Urban all argue that the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties; therefore we will not consider RHYA's and Urban's claims under section 552.104. *See* ORD 592 at 8. However, we will address the city's claim under section 552.104 for the submitted information. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 at 8 (1991). This office has held

a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The city generally argues that release of the submitted information would give an unfair advantage to a competitor or bidder. However, the city has not provided any arguments explaining how the release of the submitted information would cause a specific threat of actual or potential harm to the city's interests in a specific competitive situation. *See* ORD 592. Thus, we conclude the city has failed to establish the applicability of section 552.104 to the submitted information, and it may not be withheld on that basis.

RHYA and Urban both raise section 552.110 of the Government Code as an exception to disclosure. 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. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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.² RESTATEMENT OF TORTS § 757 cmt. b. 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 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.*; *see also* ORD 661 at 5-6.

Having considered the claims of RHYA and Urban, we conclude that they have failed to demonstrate that any portion of their respective information fits within the definition of a trade secret. RHYA and Urban have also not sufficiently established any of the trade secret factors with respect to their information. Thus, no portion of the information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review, we further determine that RHYA and Urban have made only conclusory allegations that release of their information would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual

²The 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).

evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, market studies, experience, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, we conclude that none of the submitted information may be withheld under section 552.110(b) of the Government Code.

Finally, the city, RHYA, and Urban assert that the submitted information is excepted from disclosure under section 552.131(a). Section 552.131 relates to economic development information and provides in part:

(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) is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6. We note that section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Because RHYA and Urban did not demonstrate that any of the submitted information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, or make the specific factual or evidentiary showing required under section 552.110(b) that release of the submitted information would result in substantial competitive harm, we conclude that none of the remaining information may be withheld pursuant to section 552.131(a). As the city raises no additional arguments against disclosure, the submitted information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/dls

Ref: ID# 364151

Enc. Submitted documents

c: Requestor
(w/o enclosures)

RHYA Development Partners, LLC
c/o Mr. Randall A. Pulman
Pulman, Cappuccio, Pullen & Benson, LLP
2161 NW Military Highway, Suite 400
San Antonio, Texas 78213
(w/o enclosures)

Urban Revitalization Real Estate Group, LLC
c/o Mr. Randall A. Pulman
Pulman, Cappuccio, Pullen & Benson, LLP
2161 NW Military Highway, Suite 400
San Antonio, Texas 78213
(w/o enclosures)

Windcrest Economic Development Company, LLC
c/o Mr. Randall A. Pulman
Pulman, Cappuccio, Pullen & Benson, LLP
2161 NW Military Highway, Suite 400
San Antonio, Texas 78213
(w/o enclosures)