



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 26, 2014

Mr. Brendan Hall  
Attorney  
Development Corporation of Harlingen, Inc.  
2424 Boxwood Street, Suite 125  
Harlingen, Texas 78550

OR2014-03488

Dear Mr. Hall:

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# 515057.

The City of Harlingen and the Harlingen Economic Development Corporation (collectively, the "city"), which you represent, received a request for any communication between Space Exploration Technology Corp. ("SpaceX") and the city since a specified date and any contract or economic development agreement between SpaceX and the city since a specified date. You claim the submitted information is excepted from disclosure under sections 552.105, 552.110, and 552.131 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of SpaceX. Accordingly, you state, and provide documentation showing, you notified SpaceX of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *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 SpaceX. We have considered the submitted arguments and reviewed the submitted information.

Initially, the city and SpaceX assert the information should be withheld because the company expected confidentiality when the information was submitted to the city. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion

JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Although the city argues the submitted information is excepted under section 552.110 of the Government Code, this section is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city’s argument under section 552.110. However, we will discuss SpaceX’s arguments under section 552.110. 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b. This

---

<sup>1</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;

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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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* Open Records Decision No. 661 at 5 (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).

SpaceX contends its information is commercial or financial information, release of which would cause substantial competitive harm to the company. SpaceX states it is in a highly competitive and specialized business with few participants in the market. SpaceX further states release of the information regarding the operations of its proposed commercial orbital launch site would be highly valuable to its competitors. Upon review, we find SpaceX has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold the information we marked under section 552.110(b) of the Government Code.<sup>2</sup> However, we find SpaceX has made only conclusory allegations that the release of the remaining information at issue would cause the company substantial competitive injury. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

---

(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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure.

SpaceX argues portions of its remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find SpaceX has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find SpaceX has failed to demonstrate the necessary factors to establish a trade secret claim for its information. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110). Consequently, the city may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Section 552.131 of the Government Code 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.

(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.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of SpaceX's claims under section 552.110, the city may not withhold any of SpaceX's remaining information under section 552.131(a) of the Government Code.

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *Id.* § 552.131(b). You state the information you have marked in Exhibit 4 relates

to economic development negotiations between the city and a business prospect regarding potential financial incentives. You state negotiations are still ongoing and there has not been a final agreement to date. Upon review, we find the information you have marked in Exhibit 4 consists of information about financial or other incentives being offered to a business prospect by the city. Accordingly, the city may withhold the information you have marked in Exhibit 4 under section 552.131(b) of the Government Code. However, we conclude it has not been demonstrated how any of the remaining information at issue consists of information about a financial or other incentive being offered to a business prospect. Consequently, none of the remaining information may be withheld under section 552.131(b) of the Government Code.

In summary, the city must withhold the information we have marked under section 552.110(b) of the Government Code. The city may withhold the information you have marked in Exhibit 4 under section 552.131(b) of the Government Code. The remaining 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/tch

Ref: ID# 515057

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Caryn Schenewerk  
Counsel  
Space Exploration Technologies Corporation  
1030 15<sup>th</sup> Street Northwest, Suite 220 E  
Washington, D.C. 20005  
(w/o enclosures)