



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 14, 2014

Ms. Jacqueline L. Cullom  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2014-08206

Dear Ms. Cullom:

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# 522625.

The City of Austin (the "city") received a request for application information, including the business information form, of four specified companies that applied for economic development incentives. You claim the submitted information is excepted from disclosure under section 552.131 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Cinsay, Inc. ("Cinsay"); Oracle America, Inc. ("Oracle"); Otto Bock Healthcare, LP ("Otto Bock"); and Phantom Technologies ("Phantom"). Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their 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 arguments from Oracle and Otto Bock. We have also received arguments from a member of the board of directors for Opportunity Austin ("Opportunity"). *See* Gov't Code § 552.304 (interested third party may submit written comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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 information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Cinsay or Phantom explaining why their information should not be released. Therefore, we have no basis to conclude either Cinsay or Phantom has a protected proprietary interest in the submitted information. *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. Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest Cinsay or Phantom may have in it.

Next, we understand Oracle to assert that its submitted information is confidential because it was provided to the city with the understanding that its confidentiality would be maintained. We note that 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.

Otto Bock seeks to withhold its information under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See Open Records Decision Nos. 611 at 1* (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Otto Bock has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude the city may not withhold the submitted information under that section.

Oracle and Otto Bock each raise section 552.110 of the Government Code for their information. 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. Gov’t Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential

by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny 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) (citation omitted); *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.<sup>1</sup> *See* 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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

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<sup>1</sup>There are six factors the Restatement gives as indicia of 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 the 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Oracle and Otto Bock have failed to demonstrate any of their information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the city may not withhold any of the submitted information under section 552.110(a) of the Government Code.

Upon review, we find Oracle has established some of its information, relating to its facility expansion plans, consists of commercial or financial information, the release of which would result in substantial harm to its competitive position. Accordingly, the city must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Oracle has failed to demonstrate that release of any of its remaining information would result in substantial harm to its competitive position. Additionally, we find Otto Bock has failed to demonstrate that release of any of its information would result in substantial harm to its competitive position. *See* ORD 661 (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). Accordingly, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Otto Bock also raises section 552.113 of the Government Code. Section 552.113 provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure under the Act] if it is:

...

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov't Code § 552.113(a)(2). Otto Bock has not provided any arguments explaining how any of its submitted information is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the city may not withhold any of Otto Bock's information under section 552.113 of the Government Code.

The city, Opportunity, Oracle, and Otto Bock raise section 552.131 of the Government Code. 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.

(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). Otto Bock and Oracle contend their information is excepted under section 552.131(a). Additionally, Opportunity argues all of the third parties' information is protected under section 552.131(a). We note section 552.131(a) is designed to protect the interests of the business prospect that a governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body. *See id.* § 552.131(a). Opportunity does not inform us that it represents any of the third parties whose information is at issue. As noted above, Cinsay and Phantom have not submitted arguments under section 552.131, and the city may not withhold any portion of these companies' information under section 552.131(a). Further, because we have already disposed of Otto Bock and Oracle's claims under section 552.110, the city may not withhold any of these companies' information under section 552.131(a) of the Government Code.

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). We note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Therefore, we will only address the city's argument under section 552.131(b) of the Government Code. The city claims the submitted business information forms must be withheld under section 552.131(b) because it is information that was provided by the third parties in relation to a confidential development project and the negotiations between the city and the third parties did not result in a final agreement. Upon review, we find the city has not demonstrated how any portion of the remaining information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude, the city may not withhold any of the remaining information 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 must release the remaining information.

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,



Megan G. Holloway  
Assistant Attorney General  
Open Records Division

MGH/tch

Ref: ID# 522625

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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OCT 20 2014

At 3:40 P. M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-14-001629

ORACLE AMERICA, INC., <i>Plaintiff,</i>	§ IN THE DISTRICT COURT OF
	§
	§
v.	§ 261st JUDICIAL DISTRICT
	§
THE HONORABLE GREG ABBOTT, IN HIS CAPACITY AS TEXAS ATTORNEY GENERAL & THE CITY OF AUSTIN, <i>Defendants.</i>	§ TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Plaintiff Oracle America, Inc. (Oracle) challenged Attorney General Open Records Letter Ruling OR2014-08206 (2014). Oracle sought the withholding of certain information held by Defendant City of Austin (the City). All matters in controversy between Plaintiff Oracle and Defendants Attorney General and the City arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of an agreed final judgment.

Texas Government Code section 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after receiving notice of a proposed settlement in a PIA case. The Attorney General represents to the Court that he sent notice by email to requestor Austin Business Journal, through its representative Mr. Colin Pope, on September 12, 2014, providing reasonable notice of this setting as required by Tex. Gov't Code § 552.325(c). The requestor was informed of the parties' agreement that the City must withhold a portion of the information at issue in this suit, as agreed upon between the parties. The requestor was also informed of his right to intervene in the suit to contest the withholding of the information. Mr.

Pope has informed the Attorney General that the Austin Business Journal does not intend to intervene in this lawsuit (see attached email).

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties in this suit.

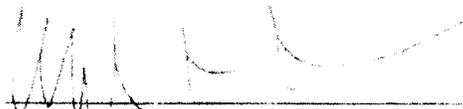
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. Oracle, the Attorney General, and the City have agreed that, in accordance with the PIA and under the facts presented, a portion of the information at issue, as indicated by a redacted copy of the information at issue provided to the City by Oracle, is excepted from disclosure pursuant to Tex. Gov't Code § 552.110(b) (hereinafter, the Excepted Information);
2. The City must withhold the Excepted Information described in Paragraph 1 of this order, and release the remaining information at issue to the requestor;
3. All court cost and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Oracle, the Attorney General, and the City in this cause, and is a final judgment.

SIGNED this 20<sup>th</sup> day of October, 2014.

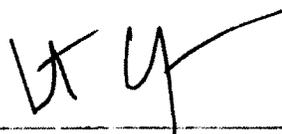
  
\_\_\_\_\_  
JUDGE PRESIDING

AGREED:



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