



Office of the Attorney General
State of Texas

June 28, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Andy McCuistion
City Manager
City of Palestine
504 North Queen Street
Palestine, Texas 75801

OR93-215

Dear Mr. McCuistion:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19336.

The City of Palestine (the "city") has received a request for information relating to an application to the city for a tax abatement. Specifically, the requestor seeks "[a]ll applications for tax abatement in the Palestine/Anderson County Enterprise zone." You advise us that "tax abatement contracts will be provided upon request."¹

You advise us that the requested information was submitted to the Enterprise Zone Administrative Board² (the "board") and on this basis claim that the city is not the custodian of the requested information. The Open Records Act does not require a governmental body to obtain information not in its possession. Open Records Decision No. 558 (1990). However, the fact that a request for public records might be more

¹In a subsequent letter to the city, the requestor seeks "[t]he City's request for an Attorney General Open Records Opinion, requested was for an opinion on my March 2, 1993 application for public information." You do not appear to seek a ruling with respect to that request, and we do not address it.

²The board was established pursuant to article 5190.7, V.T.C.S., the Texas Enterprise Zone Act (the "act"). The purpose of the act is to provide "appropriate investments, tax benefits, and regulatory relief to encourage the business community to commit its financial participation." V.T.C.S. article 5190.7, § 2. You advise us that the board consists of eleven members, including representatives of the Anderson County Commissioner's Court, the Palestine City Council, local school districts, and other public and nonpublic entities, and is "charged with determining whether a business already active within the Enterprise Zone at the time of its designation or thereafter locating within the Enterprise Zone is a qualifying business, and with implementing procedures for the abatement or refund of any applicable taxes."

appropriately directed to a different governmental body does not mean that it can be dismissed by a governmental body which actually possesses the information. Attorney General Opinion JM-266 (1984). It appears that the city is in possession of the requested information pursuant to law and in connection with the transaction of official business under section 3(a) of the Open Records Act.³ You seek to withhold some of the requested information because it contains "financial information that the companies would not wish to share with their competitors."

Pursuant to section 7(c) of the Open Records Act, Wallace Apparel, Inc., ("Wallace") and Trinity Valley Medical Center ("Trinity Valley") have been notified of the request. They have submitted to us letters in which they contend that their proprietary interests may be affected by disclosure of the requested information. Wallace claims that information contained in its application "is of a very personal nature" and "could be used by our competitors and would be very detrimental to our company's success." Trinity Valley simply requests that information contained in its application be withheld from public disclosure, but gives no reasons. Although it has been expressly invoked by neither of the two interested third-parties, we will assume for purposes of this determination that they seek to withhold the requested information under section 3(a)(10) of the Open Records Act.

Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

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, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

³We note that article 5190.7, section 22(d), requires a governing body to designate a liaison to the board. The city has designated the assistant city manager as liaison. Palestine City Ordinance No. 0-20-91. Applicants are instructed on the board's "Application for Tax Abatement" to submit their applications to the assistant city manager. The assistant city manager's duties as administrative liaison to the board are official city duties. *See* V.T.C.S. art. 5109.7, § 22(d); Palestine City Ordinance No. 0-20-91. Therefore, we believe that any records relating to board business in the possession of the assistant city manager are city records because she possesses them in connection with official duties which have been assigned to her by the city pursuant to city ordinance. The city is clearly a "governmental body" under section 2(1) of the Open Records Act, and is in possession of the records. We need not address whether the board is a "governmental body" within section 2(1) of the Open Records Act.

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, . . . [but] 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).

This office has previously held that if a governmental body takes no position with regard to whether requested information constitutes "trade secrets", we must accept a private person's claim for the exception if that person establishes a *prima facie* case for the exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.⁴

Neither Wallace nor Trinity Valley has made a *prima facie* case establishing that the requested information constitutes trade secrets, nor have they demonstrated that it is privileged or confidential under the common or statutory law of Texas. This office is not aware of any law which makes the requested information confidential. We conclude that the requested information may not be withheld under section 3(a)(10) of the Open Records Act. As the city asserts no exceptions to disclosure under section 3(a) of the

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

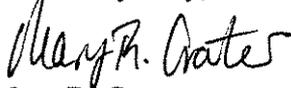
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [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.

Id.; see also Open Records Decision Nos. 319, 306 (1982); 255 (1980).

Open Records Act, we conclude that the information submitted to us for review must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/jmn

Ref.: ID# 19336
ID# 19353
ID# 19443
ID# 19640

cc: Mr. Joe Ed Bunton
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