



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 28, 1994

Ms. Johanna McCully-Bonner  
General Counsel  
Texas Department of Housing and  
Community Affairs  
P.O. Box 13941  
Austin, Texas 78711-3941

OR94-746

Dear Ms. McCully-Bonner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27683.

The Texas Department of Housing and Community Affairs (the "department") has received two requests for certain application materials submitted to the department by Dallas Area Affordable Partners, IV, L.P. Specifically, the requestors seek the following information:

[1.] [A]ny and all public information and communication in your Department's possession related to the [application of the Riverchase Club Apartments in Coppell, Texas for a federal housing tax credit] including but not limited to the grant of tax credit allocation.

[2.] [A] copy of the complete application package for the low income tax credit housing allocation to Dallas Area Affordable Partners, IV, L.L.P. for a cite in Coppell, Texas . . . [and] a copy of the applicable low income tax credit housing guidelines.

You advise us that the department has made some of the requested information available to the requestors. You object, however, to release of the remainder of the requested information and claim that sections 552.101 and 552.110 of the Government Code except them from required public disclosure.

Pursuant to section 552.305 of the Government Code, we have notified the party whose proprietary interests are implicated by this request. We have received a response from the CED Construction Companies ("CED").<sup>1</sup> Without expressly asserting section 552.110 of the Government Code, CED claims that some of the requested information constitutes trade secrets and commercial or financial information privileged or confidential by statute or judicial decision. Section 552.110 protects the property interests of private persons by excepting from required public disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. *See generally* Open Records Decision No. 592 (1991). CED claims that section 552.110 excepts the following application materials from required public disclosure:

1. Page 10, Exhibit 102 A.
2. Pages 11 and 12, Exhibits 21 and 22.
3. Page 14.
4. Pages 16, 17, and "Analysis of Cost page," immediately after page 17.
5. Exhibit 102-A, page 22A-22C/Project Cost Estimate.
6. Exhibit 103, (ii) Executed contract for sale.
7. Exhibit 106, (ii) Firm financing in place in the form of a commitment letter from a lending institution.
8. Exhibit 113, page 24A and 24B Current Financial Statements.
9. Exhibit 117 The Market Study.
10. Exhibit 118 Environmental Study.
11. Exhibit 213, (iii) Firm letter of commitment from a third party syndication company/firm.
12. Exhibit 217, Management Agreement.
13. Source and Use of Funds Statement.
14. Pro Forma Operating Statement.
15. Amount of Housing Tax Credit Necessary for Financial Feasibility.
16. Estimated Provision to Cover Gap [*sic*].

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

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

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<sup>1</sup>In this instance, CED is the only interested third party.

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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.<sup>2</sup>

We have examined the information submitted to us for review. This information was generated in connection with CED's application for a low income housing tax credit administered by the department's Low Income Housing Tax Credit Program. *See* Gov't Code § 2306.075 (providing that department is to administer the Low Income Housing Tax Credit Program). On its face, the requested information does not appear to contain trade secrets. Specifically, it does not reveal "a process or device for continuous use in the operation of the business." *See* RESTATEMENT, *supra*. Instead, the submitted information appears to relate to "single or ephemeral events" in CED's business, *i.e.*, to a certain housing project undertaken in Coppell, Texas. *Id.* CED has not explained, nor does the submitted information reflect, that the information reveals "a process or device for continuous use in the operation of the business." In addition, while CED makes

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<sup>2</sup>The 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2, 306 at 2 (1982); 255 (1980) at 2.

apparent reference to the Restatement criteria, its arguments are conclusory and provide insufficient information to enable us to determine whether in this instance the criteria apply. We conclude, therefore, that CED has failed to make a *prima facie* case that the requested information contains trade secrets. In addition, CED has not cited, nor are we aware of, any statute or judicial decision that makes the requested information privileged or confidential. Therefore, the department may not withhold the submitted information under section 552.110 of the Government Code. The department must release the requested information 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 our office.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Open Government Section

KHG/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 27683

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