



Office of the Attorney General  
State of Texas

January 9, 1998

DAN MORALES  
ATTORNEY GENERAL

Mr. John Steiner  
Division Chief  
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OR98-0099

Dear Mr. Steiner:

By this ruling, this office withdraws Open Records Letter No. 98-0048 (1998) and substitutes the decision below. We have assigned ID# 113577 to this withdrawal and substitution.

The City of Austin (the "city") received a request for "the RFP for the Convention Center Sales #GB 953000149 and the existing contract for Capital City Chamber #S-0035-96." In response to the city's request for an opinion regarding this request received by this office on October 10, 1997, we issued Open Records Decision No. 98-0048 (1998) on January 6, 1998, two days before the statutory deadline. *See Gov't Code § 552.306* (attorney general shall render decision not later than 60th working day after date attorney general received the request for a decision).

Because the property and privacy rights of a third party may be implicated by the release of some of the requested information, on November 26, 1997, this office notified Capital City Chamber of Commerce ("Capital City") of this request and of its opportunity to claim, within fourteen (14) days of receipt of the notice, that the information at issue is excepted from disclosure. *See Gov't Code § 552.305*. Although this office received Capital City's response to our notification on January 5, 1998, a decision had already been finalized and this decision was deposited in the mail on January 6, 1998. Therefore, we now consider the city's request for an opinion in light of the brief submitted by the third party, Capital City. *See, e.g., Open Records Decision Nos. 552 (1990), 150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Initially, we note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987). Section 552.110 protects the property and privacy interests of third parties 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.

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.), *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 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). 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. *Id.*<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

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<sup>1</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* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act, 5 U.S.C. § 552, when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. The city has expressed no opinion on this subject. If the second test regarding substantial harm to the competitive position of the third party is satisfied, the information may be withheld. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

In this instance, Capital City has not adequately demonstrated how the release of the information at issue would either impair the government's ability to obtain necessary information in the future or result in "substantial competitive injury" to Capital City. Nor has Capital City demonstrated by a *prima facie* case that the records at issue contain trade secrets. The city therefore must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/alg

Ref.: ID# 113577

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