



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 29, 1998

Mr. Rob Hill
Assistant General Counsel
Texas Department of Economic Development
P.O. Box 12728
Austin, Texas 78711-2728

OR98-2548

Dear Mr. Hill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 119015.

The Texas Department of Economic Development (the "department") received a request for various categories of information concerning specified Texas Capital Funds applications, and correspondence among the parties. You assert that the submitted "I.R.S. Form 4868" is confidential by law pursuant to section 552.101, and the submitted "feasibility report" is excepted from required public disclosure under sections 552.104 and 552.110 of the Government Code.¹ We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

We first address the assertion that section 552.101 of the Government Code excepts the submitted Internal Revenue Service Form 4868. Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, including information made confidential by statute. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v.*

¹As you have not raised an applicable exception for any other records, we assume that the responsive information, should it exist, will be released.

Calabrese, 101 F.R.D. 427 (D.C. 1984). Accordingly, the department must withhold all tax return information from disclosure under section 552.101 of the Open Records Act.

We next consider the department's assertion that the "feasibility report requested should be excepted from disclosure," under sections 552.104 and 552.110. Pursuant to section 552.305 of the Government Code, we notified Georgetown Waterpark, Ltd. ("Waterpark") of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. Waterpark responded to our notification and asserted that the feasibility report is "highly confidential and proprietary information that, if publicly disclosed, would cause substantial harm." Furthermore, Waterpark's counsel states that the company was aware of the "potential . . . problem, and was careful to specifically indicate on each and every page of the study that the document was "CONFIDENTIAL."² Therefore, we will first consider whether the information at issue is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open

²In fact, the record submitted to this office is not marked confidential. Further, 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).

Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

It is our understanding that the feasibility "reports held by the Department, . . . , were received and are maintained as part of the application for grant funds." Therefore, the information was required to be submitted. Thus, we do not believe that you have established the applicability of the impairment prong in this instance. *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (no impairment where information was required for bid or contract; contractors "will continue bidding for [agency] contracts despite the risk of revealing business secrets if the price is right"); *McDonnell Douglass Corp. v. National Aeronautics & Space Admin.*, 895 F. Supp. 316; (D.D.C. 1995); *see Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1579 (1992). *See generally* OFFICE OF INFORMATION & PRIVACY, UNITED STATES DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (1997) 149-152, 156-161, n. 142 (discussing "confidential" information under *Critical Mass* and impairment prong under *National Parks*).

"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). Neither the department nor Waterpark have established that releasing the requested information would likely cause Waterpark to suffer substantial competitive injury. Therefore, we conclude that the requested information is not excepted from disclosure pursuant to either prong of section 552.110.

We next consider whether section 552.104 applies to the submitted "feasibility report." Section 552.104 states that:

[i]nformation is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

Section 552.104 protects the government's interest in purchasing by assuring that the bidding process will be truly competitive. *See* Open Records Decision Nos. 592 (1991) (exception protects interests of governmental body, usually in competitive bidding situations), 583 (1990), 554 (1990). Section 552.104 requires a showing of some specific actual or potential harm in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991), 554 (1990), 541 (1990). Furthermore, a general allegation of a remote possibility that some unknown competitor might gain some unspecified advantage by disclosure is not sufficient

to invoke section 552.104. *Id.*; *see also* Open Records Decision No. 331 (1982) (where only one person seeks contract, no "competitors" exist for purposes of predecessor to section 552.104).

In this instance, it appears that the department is claiming section 552.104 on behalf of a third-party. *See generally* Open Records Decision Nos. 592 (1991); *see also* Open Records Decision No. 231 (1979) (feasibility study prepared by governmental body not excepted by the predecessor to section 552.104). In this instance, neither the department nor the third-party have established the applicability of section 552.104 to the requested information. Therefore, under the facts presented, we conclude that the requested record may not be withheld pursuant to section 552.104 of the Government Code.

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,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

Ref.: ID# 119015

Enclosures: Submitted documents

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