



February 7, 2000

Ms. Sharon Hicks
City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604

OR2000-0457

Dear Ms. Hicks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131885.

The Development Corporation of Abilene and the City of Abilene (the “city”) received a request for information relating to a proposed transaction with Aerobotics. We understand you to indicate that you have released information responsive to the part of the request seeking “[a]ll resolutions and ordinances of the City of Abilene approving any aspect of this transaction,” and that the city has no documents responsive to the part of the request seeking “[a]ll agreements between Aerobotics . . . and the [city] pertaining to the use of sales tax funds, training of prospective employees, and the creation of new jobs.” You seek to withhold, under sections 552.104, 552.110, and 552.131 of the Government Code, information responsive to the parts of the request asking for:

- (1) All documents, proposals, financial statements, and corporate information that Aerobotics submitted to Abilene in conjunction with Abilene providing funds from the half-cent sales tax fund for economic development; [and]
- (2) All correspondence between any representatives of Aerobotics and any official of the City of Abilene and/or the Abilene Economic Development Authority pertaining to providing funds to Aerobotics from the sales tax.

Aerobotics was notified of the request pursuant to section 552.305 of the Government Code and has submitted arguments to this office that the portions of the information at issue are protected from disclosure by sections 552.101, 552.304, 552.110, and 552.131.

We note at the outset that the city has failed to submit to this office, within fifteen business days of its receipt, a copy of the written request as required by section 552.301(e)(1)(B).

Therefore, pursuant to section 552.302, the city must release the requested information unless there is a “compelling reason” to withhold the information. A “compelling reason” for withholding information under section 552.302 would be that the information is confidential by law or implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). Section 552.104, which protects the interests of governmental bodies in competitive situations, is not a confidentiality provision and may be waived by the governmental body. It may not serve as the basis of a compelling reason for withholding information under section 552.302. *See, e.g.*, Open Records Decision No. 592 (1991). Similarly, it is our opinion that section 552.131¹, to the extent that its protection extends beyond the scope of that afforded by section 552.110, may also be waived by the governmental body and may not serve as a compelling reason for non-disclosure under section 552.302. Accordingly, we will not consider the city’s claims for withholding information under subsection (b) of section 552.131, which excepts from disclosure information about a financial or other incentive offered to a business prospect by a governmental body unless and until an agreement is made with the business prospect.

Section 552.131(a) excepts information related to economic 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:

(a) a trade secret of the business prospect; or

(b) 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.

Subsection (a) protects two categories of information: 1) trade secrets and 2) commercial or financial information.

A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to

¹As of September 1, 1999, there are four sections in chapter 552 of the Government Code denominated section 552.131. References to section 552.131 in this ruling refer to the section 552.131 added in 1999 by Senate Bill 1851, “Exception: Economic Development Information.” Subsection (a) of section 552.131 excepts from disclosure trade secret and commercial or financial information in the context of 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. The protection afforded by subsection (a) in the economic development context is the same as that afforded by section 552.110 generally, discussed *infra*. Subsection (b) of section 552.131 excepts from disclosure information about a financial or other incentive offered to a business prospect by a governmental body unless and until an agreement is made with the business prospect. Again, it is our opinion that the protection of subsection (b) of section 552.131 is for the benefit of the governmental body and may be waived by same.

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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

There are six factors to be assessed in determining 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 this 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 (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information 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. Open Records Decision No. 552 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.131(a) applies. Open Records Decision No. 402 (1983).

Aerobotics contends that the information at issue consists of trade secrets and commercial or financial information protected from disclosure by section 552.131(a). In our opinion, Aerobotics has not established that any particular portions of the information at issue constitute trade secrets such as to be protected from disclosure by the trade secret aspect of section 552.131(a). We have marked portions of the submitted information which we believe constitutes commercial or financial information for which Aerobotics has demonstrated, based on specific factual evidence, that disclosure would cause it substantial competitive harm. Such marked information must be withheld under the commercial or financial information aspect of section 552.131(a). None of the other information at issue may be withheld under section 552.131.

Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. Aerobotics contends that the information at issue contains “private financial information and other information with respect to private facts” concerning the principle owner of the company and other company personnel. We have marked information which must be withheld under the common law privacy aspect of section 552.101.

Since we believe that section 552.131(a), addressed above, protects the same kinds of information in the economic development negotiations context as does section 552.110 generally, and the information at issue here all relates to economic development negotiations, we need not separately address Aerobotics claims under section 552.110.² Except as noted above, the requested information must be released.³

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the

²Section 552.110 protects:

(a) a trade secret obtained from a person and privileged or confidential by statute or judicial decision
[; and]

(b) 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.

³You advise that the city has executed a confidentiality agreement with Aerobotics regarding the information it submitted to the city. Such confidentiality agreements, absent specific legislative authority of which you have not apprized us here, are ineffective to except information from disclosure under chapter 552. See Open Records Decision No. 514 (1988).

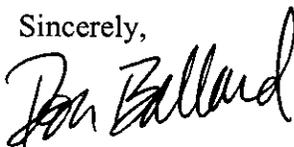
governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Don Ballard
Assistant Attorney General
Deputy Chief, Open Records Division

JDB/WMW/ljp

Ref: ID# 131885

Encl. Submitted documents

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