



July 26, 2000

Ms. Elizabeth Elam
Taylor, Olson, Adkins, Sralla & Elam, L.L.P.
500 Throckmorton Street
Fort Worth, Texas 76102-3821

OR2000-2842

Dear Ms. Elam:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137442.

The City of Mansfield (the "city"), which you represent, received a written request for records that a named developer has submitted to the city in connection with a request for assistance in the construction and development of a recreational vehicle park. In addition to contending that the information at issue is excepted from public disclosure under sections 552.101, 552.110, and 552.131 of the Government Code, you also have sought a decision from this office pursuant to section 552.305 of the Government Code as to whether the city must release the requested documents.

Section 552.305 authorizes parties with a privacy or proprietary interest in requested information to submit arguments to this office as to why the information is excepted from required public disclosure. In accordance with section 552.305(d), the city notified representatives of MLN Holdings Incorporated ("MLN") of the current records request and of their obligation to submit arguments to this office for withholding the information at issue. An attorney representing both the developer in his individual capacity as well as MLN has responded to the notice and has identified specific documents that they contend come under the protection of sections 552.101, 552.110, and 552.131 of the Government Code. Specifically, the developer and MLN contend that certain personal and commercial financial information, profitability studies, and cost projections should be withheld from public disclosure.¹

¹The requestor has also submitted comments to this office as to why the records at issue are subject to required public disclosure.

Section 552.101 of the Government Code 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. 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.

In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded:

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 at 3.

Although information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest, and thus does not come under the protection of common law privacy, *see* Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989), common law privacy generally protects the “background” financial information of the individual. Some of the documents you submitted to us for review contain information about individuals’ personal financial assets and liabilities. We conclude that this type of information is highly intimate. Moreover, the requestor of the information has not made a particularized showing that would make the individuals’ personal financial information a matter of legitimate public concern. We conclude, therefore, that the city must withhold such information from the public pursuant to section 552.101 of the Government Code.² We have marked these documents accordingly.

Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (a) confidential trade secrets, 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. MLN contends that both branches of section 552.110 apply to its financial statements, profitability studies, and cost projections.

²We note, however, that business entities do not have a right to privacy. *See* Open Records Decision No. 192 at 4 (1978). Thus, MLN has no right of privacy in the information at issue here.

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 at 2 (1990). 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.³ *Id.* 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 at 5-6 (1990).

Section 757 of the Restatement of Torts 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. [Emphasis added.]*

Although MLN has submitted arguments to this office attempting to demonstrate how the six trade secret factors apply to the financial statements, profitability studies, and cost projections, after reviewing the information at issue here, we do not believe that these types of information comport with the definition of "trade secret" found in the Restatement. Specifically, the information at issue does not constitute "a process or device for continuous use in the operation of" an MLN enterprise.

³The 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 (1982), 306 at 2 (1982), 255 at 2 (1980).

Because none of the information at issue constitutes a “trade secret” for purposes of section 552.110(a), we next consider whether MLN has demonstrated that the information is excepted from public disclosure under section 552.110(b). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

MLN contends that the release of the information at issue would result in substantial harm to its competitive position in the marketplace because the information “would reveal economic strategy as well as pricing structures” and that “[t]here are others in the marketplace who are interested in pursuing the same type of development as proposed by” MLN. After reviewing MLN’s arguments and the documents at issue, we conclude that MLN has demonstrated the applicability of section 552.110(b) to only its two “Pro-forma Operating Statements” projecting MLN’s expenses and income on a monthly and yearly basis. Accordingly, these two documents, which we have marked with red flags, are the only documents coming under the protection of section 552.110(b); none of the remaining information may be withheld pursuant to section 552.110.

Finally, we address both your and MLN’s contentions regarding the applicability of section 552.131 of the Government Code, as added by Acts 1999, 76th Leg., ch. 1319, §9, which reads as follows:

(a) Information is excepted from [required public disclosure] if the information relates to 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 and the information relates to:*

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

(2) *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.*

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021

information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source. [Emphasis added.]

Given the language of section 552.131, we conclude that this section is inapplicable to the information at issue. We first note that this section applies to information pertaining to a business “that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body.” Gov’t Code § 552.131(a). We find no evidence in the documents at issue or in the briefs submitted to this office that the city has requested or otherwise sought the creation of a recreational vehicle park in or near the city.⁴ Second, section 552.131(a) excepts from public disclosure only “trade secrets” and “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.” In this regard, section 552.131 is co-extensive with section 552.110. Because MLN has not demonstrated that the information at issue, other than the profitability studies referenced above, is excepted from public disclosure under section 552.110, none of the remaining information may be withheld pursuant to section 552.131(a). Finally, we find no evidence in the information before us that the city has offered to MLN “a financial or other incentive” so as to trigger the applicability of section 552.131(b).

In summary, the city must withhold the personal financial statements and information pursuant to section 552.101 of the Government Code in conjunction with the common law right of privacy. Because MLN has demonstrated the applicability of section 552.110(b) to its profitability studies, these documents are excepted from public disclosure. However, neither the city nor MLN has demonstrated the applicability of sections 552.110 or 552.131 of the Government Code to the remaining documents submitted to this office, nor is it apparent to this office how section 552.131 is otherwise applicable here. Consequently, the remaining documents at issue must be released to the requestor.

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 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

⁴In fact, such a proposal was previously rejected by the city council.

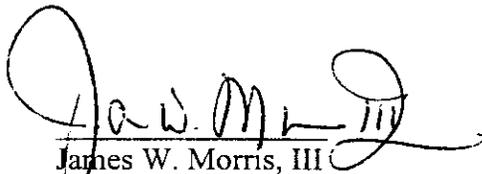
governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/ljp

Ref: ID# 137442

Encl. Submitted documents

cc: Ms. Karen L. Graham
19 Brook Arbor Court
Mansfield, Texas 76063
(w/o enclosures)

Mr. Franklin W. Cram, P.C.
Attorneys and Counselors at Law
990 N. Walnut Creek, Suite 2008
Mansfield, Texas 76063-1572
(w/o enclosures)