



October 18, 2000

Mr. Frank Garza  
City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2000-4050

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID#140276.

The City of San Antonio (the "city") received a request for information regarding an exhibition game held in April 1999 at the Nelson Wolfe Stadium between the Houston Astros (the "Astros") and the Detroit Tigers (the "Tigers"). The requestor specifically seeks:

Financial Report of April 1999 Exhibition Game, Financial report of all payout per contractual agreements, Financial Payout to San Antonio Missions Baseball AA for Ticket Sales and Clubhouse Payouts, Financial report of all Advertising payout and monies received from Exhibition Advertisers, Copy of all City Staff and Former City Staff members who were involved with the Contractual Agreement, Copy of the Meeting Minutes between all Parties for the Exhibition Contract, Copy of all correspondence between former Mayor Nelson Wolfe, Mayor Howard Peek and the City Of San Antonio concerning Exhibition Contractual agreement[.]

You have submitted for our review information that is responsive to the request, consisting of two "settlement sheets" that summarize the revenue and expenditures associated with the

event.<sup>1</sup> You assert that this information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code.

The city has also notified the Astros, the Tigers, and the San Antonio Missions (the "Missions") of the request by a letter dated August 9, 2000 in compliance with section 552.305 of the Government Code. *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 to public disclosure in certain circumstances). The Astros and the Missions each responded to the notice through their respective legal counsel. The Astros and the Missions each assert that the information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. The requestor has also submitted comments to this office which, in part, state that the requestor has obtained a copy of the event contract involving the city, the Astros, and the Missions. *See* Gov't Code § 552.304. We have considered the asserted exceptions and the submitted comments and arguments, and we have reviewed the submitted information.

We note at the outset that section 552.022 of the Government Code, in relevant part, states that certain categories of information "are public information and not excepted from required disclosure under [chapter 552 of the Government Code] unless they are *expressly confidential under other law*[" Gov't Code § 552.022(a) (emphasis added). Among such categories is "information in an *account, voucher or contract* relating to the receipt or expenditure of public or other funds by a governmental body[" *See id.* § 552.022(a)(3) (emphasis added). We believe the settlement sheet produced by the city constitutes information in an account or contract that relates to the receipt or expenditure of public or other funds by the city. Accordingly, by the express terms of section 552.022, this information is not excepted from required public disclosure unless "expressly confidential under other law."

Relying on Open Records Letter 97-2516 (1997), the city argues that release of the information would harm the competitive interests of the city and that the information is

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<sup>1</sup>We note that the request appears to encompass more information than that reflected in the two submitted "settlement sheets." You do not state whether any information responsive to the request has been released to the requestor, nor do you advise whether the submitted "settlement sheets" constitute the sole information that is responsive to the request or consist of representative samples of the responsive information. *See* Gov't Code § 552.301(e)(1)(D). Please note that a governmental body must make a good faith effort to relate a request to that information which it holds. Open Records Decision No. 561 at 8 (1990). This open records letter does not reach nor authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

therefore excepted under section 552.104 of the Government Code.<sup>2</sup> However, we note that section 552.022 of the Government Code has been substantially amended since the issuance of Open Records Letter 97-2516 (1997). We also note that the purpose of section 552.104 is to protect the interests of the city, not that of private parties that submit information to the city. See Open Records Decision No. 592 at 8-9 (1991). As such, section 552.104 is a discretionary exception under the Act and does not constitute "other law" that makes information confidential so as to override the public disclosure requirements of section 552.022. Therefore, the information is not excepted from disclosure by section 552.104 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The city, the Astros, and the Missions each assert this provision, but none of the assertions specify any provision of law or judicial decision that makes confidential any of the information at issue.<sup>3</sup> Likewise, we are aware of no provision of law that makes the submitted information confidential so as to be excepted by section 552.101. Accordingly, we conclude that the information is not excepted from disclosure by section 552.101 of the Government Code.

Section 552.110 of the Government Code states:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
- (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 is excepted from [required public disclosure.]

The Astros assert the information contains or consists of trade secrets and is thus subject to section 552.110(a). A "trade secret"

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<sup>2</sup>Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder."

<sup>3</sup>We note that information is not confidential under the Act simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential, nor can a governmental body promise to keep information confidential absent statutory authorization. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987).

may consist of 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) (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). This office has stated that information is excepted from disclosure under section 552.110(a) where a *prima facie* showing is made to this office that the information constitutes a trade secret. Open Records Decision No. 552 (1990). In the instant case, however, the submitted arguments do not demonstrate, nor is it apparent to this office, that any of the information at issue meets the above-quoted definition of a trade secret. The information relates to a "single or ephemeral event" and no argument is made that any of the submitted information is "for continuous use in the operation of [a] business." As none of the information has been shown to meet the definition of a trade secret, we conclude the information is not excepted by section 552.110(a).

As to section 552.110(b), the city, in part, argues that the provision protects *the city's* competitive interests. The city, in part, also essentially argues that release of the information might compromise the future ability of *the city* to obtain favorable contractual terms with third parties. These arguments, expressing the commercial interests of *the city*, evidently rely on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, we note that standard was overturned by the Third Court of Appeals when the court held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App. - Austin 1999, pet. denied.). Indeed, section 552.110(b) now expressly states the standard to be applied and, as quoted above, the language of subsection (b) requires the *third party* whose information is at issue to make a *specific factual or evidentiary showing*, not conclusory or generalized allegations, that disclosure of its information would likely result in substantial competitive injury to the *third party*. *See also* Open Records Decision No. 661 at 5-6 (1999).

We have therefore considered whether the city, the Astros, or the Missions have demonstrated that substantial competitive injury would likely result *to the Astros or the Missions* from disclosure of the submitted information. Upon careful consideration of the arguments, we do not believe the city, the Astros, or the Missions have demonstrated based on *specific factual evidence*, not conclusory or generalized allegations, that disclosure of any of the specific information at issue would cause substantial competitive harm to either the Astros or the Missions. Accordingly, the information is not excepted from required public disclosure by section 552.110(b) of the Government Code. As none of the asserted exceptions have been demonstrated to apply, the city must release the submitted information 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 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).

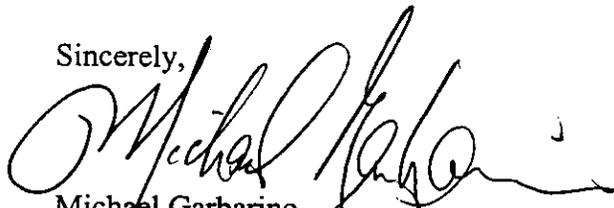
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/pr

Ref: ID#140276

Encl. Submitted documents

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cc: Mr. Randy Smith  
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