



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

October 6, 2003

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2003-6763A

Dear Ms. Dye:

You asked whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. This office assigned your request ID# 188277 and issued Open Records Letter No. 2003-6763 (2003). We have since determined that an error was made in the decisional process and that Open Records Letter No. 2003-6763 (2003) was incorrect. Therefore, Open Records Letter No. 2003-6763 (2003) is hereby withdrawn. This decision is substituted for the previous decision and serves as the correct ruling.

The County Judge of Bexar County (the "county") received a request for all motions, orders, deeds, and other records relating to sales of county property under section 34.05 of the Tax Code during a specified time interval. You indicate that the county will release some of the requested information. You take no position with regard to whether the remaining requested information is excepted from public disclosure. You believe, however, that the remaining information may implicate the proprietary interests of a private party, the law firm of Linebarger, Goggan, Blair & Sampson, LLP ("Linebarger"). You have submitted the information that you believe may implicate Linebarger's interests. You also have notified Linebarger of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released.¹ We received correspondence

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (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 disclosure under Gov't Code ch. 552 in certain circumstances).

from Linebarger. We also received comments from the requestor.² We have considered all of the submitted arguments and have reviewed the submitted information.

You concede that the county did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

You inform us that the county received this request for information on April 29, 2003. You requested our decision on July 21, 2003. Thus, the county did not request this decision within the ten-business-day period prescribed by section 552.301(b). Furthermore, the county did not timely comply with section 552.301(e). Therefore, the submitted information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. In this instance, Linebarger claims that the submitted information is excepted from disclosure under section 552.110 of the Government Code. A claim under section 552.110 can provide a compelling reason for non-disclosure under section 552.302.

Linebarger also contends, however, that the submitted information is not subject to the Act. Therefore, we must first address this threshold issue. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act defines "public information" as consisting of

²*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Furthermore, the Act is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

Linebarger informs us that it represents the county in the collection of delinquent property taxes. Linebarger states that the submitted information consists of work lists and distribution sheets. Linebarger informs us that these documents relate to tax resales conducted by the county and were developed by the law firm in the late 1990's. Linebarger states that resales were previously conducted without the benefit of work lists and distribution sheets. Linebarger asserts that, because county resales were conducted successfully previous to its development of the work lists and distribution sheets, this information is not necessary to conduct the resales and is not required to be maintained by the county. Linebarger contends that the work lists and distribution sheets are therefore not subject to the Act.

We disagree. As a general rule, information that is collected by a governmental body's attorneys while they are acting as its attorneys relates to the governmental body's official business. *See* Open Records Decision No. 499 at 2-3 (1988). Furthermore, when a governmental body employs an agent to carry out a task that otherwise would have been performed by the governmental body itself, information relating to that task that the agent assembles or maintains is subject to the Act. *See* Open Records Decision No. 518 at 3 (1989). Ordinarily, an attorney for a governmental body acts as its agent in providing legal representation. *See* Open Records Decision No. 499 at 4 (1988) (attorneys for governmental bodies acted as their respective agents in performing requested legal services on governmental bodies' behalf). Accordingly, we conclude that the submitted information

constitutes public information and is subject to the Act. *See* Gov't Code § 552.002(a)(2); Open Records Decision No. 499 at 5 (1988) (records held by private attorney that are related to legal services performed by attorney at request of governmental body are subject to Act).

Next, we consider Linebarger's arguments under section 552.110 of the Act. Section 552.110(a) excepts from required public disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision[.]" The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (1990).

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

Section 552.110(b) excepts from disclosure “[c]ommercial 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[.]” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Linebarger contends that the submitted information constitutes a trade secret of the law firm. We also understand Linebarger to assert that this information is protected from disclosure under section 552.110(b). Having considered the law firm’s arguments, we conclude that Linebarger has demonstrated that the submitted “distribution sheets” (Bates stamp nos. 000256-000277) are excepted from disclosure under section 552.110 of the Government Code. Therefore, the county must withhold that information. We conclude that Linebarger has not demonstrated that the submitted “work lists” (Bates stamp nos. 000001-000255) are excepted from disclosure under section 552.110. Thus, that information must be released.

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).

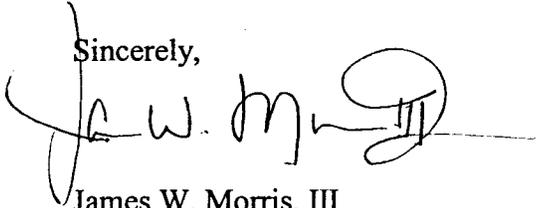
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 188277

Enc: Submitted documents

c: Mr. Rand J. Riklin
Goode Casseb Jones Riklin Choate & Watson
P.O. Box 120480
San Antonio, Texas 78212-9680
(w/o enclosures)

Mr. John E. Clark
Goode Casseb Jones Riklin Choate & Watson
P.O. Box 120480
San Antonio, Texas 78212-9680
(w/o enclosures)

Ms. Mary Belan Doggett
Linebarger, Goggan, Blair & Sampson
711 Navarro Street, Suite 300
San Antonio, Texas 78205
(w/o enclosures)