



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2004

Mr. Benjamin M. Hanson
General Counsel
Office of the Secretary of State - Executive Division
P.O. Box 12697, Capitol Station
Austin, Texas 78711-2697

OR2004-4730

Dear Mr. Hanson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203065.

The Secretary of State received a request for information pertaining to Hart InterCivic, Incorporated ("Hart"). Although you assert that the submitted information may be excepted from disclosure under various provisions of the Public Information Act (the "Act"), you take no position and make no arguments regarding these exceptions. Instead, pursuant to section 552.305, you have notified Hart of the request and of its opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In correspondence with this office, Hart claims that portions of the requested information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.¹

We begin by addressing the extent to which this information is subject to the Act. Section 122.0331 of the Election Code provides in part:

- (a) Copies of the program codes and the user and operator manuals and copies or units of all other software and any other information, specifications,

¹Having reviewed the submitted request, we understand that the requestor has agreed to the redaction of certain information from the requested records. We do not address such information in this ruling.

or documentation required by the secretary of state relating to an approved electronic voting system and its equipment must be filed with the secretary.

....

(d) The *program codes and all other software* on file with the secretary of state under this section *are not public information*. The materials shall be made available to the attorney general or the general's designee in any investigation of election irregularities. The materials may be made available in a judicial proceeding on the request of the court or other tribunal but may be viewed in camera only.

Elec. Code § 122.0331(a), (d) (emphasis added). This section exempts program codes and software filed with the Secretary of State from the realm of public information that must be released under the Act. *Cf.* Open Records Decision No. 581 (1990) (determining that computer programming that has no significance other than its use as tool for maintenance, manipulation, or protection of public property is not kind of information made public by predecessor to Act). However, this exemption does not extend to manuals or other documentation associated with such codes and software. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, to the extent the submitted information consists of “program codes and . . . other software” filed with the Secretary of State pursuant to section 122.0331, it is not public information and need not be released.²

To the extent the submitted information does not constitute “program codes and . . . other software,” we will address Hart’s remaining arguments. Hart notes that the information it seeks to withhold has been marked as “Confidential” or “Proprietary.” Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement or statement specifying otherwise.

Hart also contends that the submitted information is protected under section 552.110 of the Government Code. This exception protects the property interests of private persons by

²Because of our ruling on this issue, we need not address Hart’s arguments regarding section 552.101 of the Government Code and section 122.0331 of the Election Code.

excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (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.

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). Section 757 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939). 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). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition

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).

of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code exempts 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[.]” Gov’t Code § 552.110(b). 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* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered Hart’s arguments and reviewed the information at issue, we find that the company has made a *prima facie* demonstration that most of the information at issue constitutes trade secrets, and we have received no argument that rebuts Hart’s claim as a matter of law. We have marked the information that the Secretary of State must withhold pursuant to section 552.110(a) of the Government Code. As for the remaining information, we find that Hart has neither shown that any of this information meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, the remaining information may not be withheld pursuant to section 552.110(a). In addition, we find that Hart has made only conclusory allegations that release of the remaining information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, none of the remaining information may be withheld pursuant to section 552.110(b).

In summary, to the extent the submitted information consists of “program codes and . . . other software” filed with the Secretary of State pursuant to section 122.0331 of the Election Code, it is not public information and need not be released. To the extent the submitted information does not constitute “program codes and . . . other software,” it is subject to the Act. We have marked those portions of this information that the Secretary of State must withhold pursuant to section 552.110(a) of the Government Code. The remaining submitted 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).

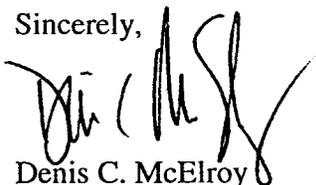
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/krl

Ref: ID# 203065

Enc. Submitted documents

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