



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2004

Ms. Joan Moeller
Ms. Christy Wallace
The University of Texas Investment Management Company
221 West 6th Street
Austin, Texas 78701

OR2004-4996

Dear Ms. Moeller and Ms. Wallace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202796.

The University of Texas Investment Management Company ("UTIMCO") received two requests for information relating to Farallon Capital Offshore Investors and Farallon Capital Management, LLC (collectively "Farallon"), Bracebridge Capital, or their funds or affiliates. Your letters to the requestors reflect that some of the requested information does not exist. You also have informed this office that UTIMCO has no responsive information concerning Bracebridge Capital. We note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require UTIMCO to release information that did not exist when it received this request or to create responsive information.¹ You also inform us that UTIMCO has released some of the requested information. UTIMCO takes no position with regard to the public availability of the rest of the requested information. You believe, however, that the remaining information implicates the proprietary interests of Farallon under section 552.110 of the Government Code. You have submitted the remaining information that is responsive to these requests. You also have notified Farallon of these requests for information and of Farallon's right to submit arguments to this office as to why the remaining requested information should not be released.² We received correspondence from

¹See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

attorneys for Farallon. We have considered all of the submitted arguments and have reviewed the submitted information.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret 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.” Gov’t Code § 552.110(a)-(b).

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*

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*

Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition 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) 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).

Farallon informs this office that it does not object to the disclosure of some of the information that UTIMCO has withheld.⁴ As UTIMCO claims no exception to the disclosure of any of that information, it must be released. Farallon contends that the rest of the requested information qualifies as a trade secret under section 552.110(a). Farallon also argues that the rest of the requested information is excepted from disclosure under section 552.110(b). Having considered all of these arguments, we conclude that Farallon has demonstrated that UTIMCO must withhold the information that we have marked under section 552.110(b). We otherwise find that Farallon has not established that any of the remaining information qualifies as a trade secret under section 552.110(a). Likewise, Farallon has not made the demonstration required by section 552.110(b) that public disclosure of any of the remaining information would be likely to cause Farallon any substantial competitive harm. Therefore, the remaining information is not excepted from disclosure under either aspect of section 552.110. We have marked the submitted information that UTIMCO must withhold under section 552.110. The remaining 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.

(1982), 255 at 2 (1980).

⁴Farallon informs this office and UTIMCO that the following information may be released: (1) the ERISA Compliance Letter and Investor Certificate; (2) the Privacy Notice; (3) the Letter of Correspondence Regarding Director Changes for Farallon Capital Offshore Investors, Inc. ('FCOI'); and (4) the Memorandum and Articles of Association, Amendment to Articles, and Letters of Correspondence Regarding Changes in Articles, except for a letter dated May 3, 2002.

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", written over a horizontal line.

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

JWM/sdk

Ref: ID# 202796

Enc: Submitted documents

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