ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2005

Mr. James R. Evans, Jr.
Linebarger, Goggan, Blair & Sampson, LLP
P. O. Box 17428
Austin, Texas 78760

OR2005-09954

Dear Mr. Evans:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 235649.

The Pecos County Appraisal District (the "district"), which you represent, received a request for "[all] detailed mineral appraisal data and [all] supporting mineral appraisal data for the 2004 and 2005 appraisal years." You believe that the requested of information may involve the third-party proprietary interests of T. Y. Pickett & Company ("Pickett"). Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the district notified Pickett of the request for information and of its right to submit arguments explaining why the information concerning the company should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 in certain circumstances). You also indicate that neither the district nor Pickett maintains some of the requested information.[1] You claim

[1]The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). We note, however, that 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).

that the remaining requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we understand you to state that most, if not all, of the requested information was prepared for the district by Pickett, an outside appraiser. Therefore, this information is subject to section 25.01(c) of the Tax Code, which provides as follows:

> A contract for appraisal services for an appraisal district is invalid if it does not provide that copies of the appraisal, together with supporting data, must be made available to the appraisal district and such appraisals and supporting data shall be public records. "Supporting data" shall not be construed to include personal notes, correspondence, working papers, thought processes, or any other matters of a privileged or proprietary nature.

Tax Code § 25.01(c). The effect of this provision is to make public the appraisal and "supporting data" which were provided to the district. *See* Attorney General Opinion JC-0424 at 2 (2001) (section 25.01(c) provides that certain information used or created by appraisal firm must be made available to appraisal district and deems that information public). Exceptions to disclosure under the Act generally do not apply to information that is made public by other statutes, such as section 25.01(c). *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, to the extent the information at issue constitutes an appraisal or supporting data for purposes of section 25.01(c), such information is a public record which must be released to the requestor. *See* Tax Code § 22.27(b)(6) (information made confidential by section 22.27(a) may be disclosed if and to the extent the information is required to be included in a public document or record that the appraisal office is required to prepare or maintain). To the extent the information at issue does not constitute an appraisal or supporting data for purposes of 25.01(c), we will address the submitted arguments against disclosure.

First, although we have not received comments directly from Pickett, the district has submitted information that was provided to it by the company in which we understand Pickett to assert that some of the information at issue is proprietary to the company. In this regard, we address the company's assertion under section 552.110 of the Government Code,

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[2]You also cite section 552.113 of the Government Code in your initial brief to this office. However, because you have not submitted any arguments explaining how section 552.113 applies to the submitted information, we conclude that the district has waived this exception. *See* Gov't Code §§ 552.301, .302.

[3]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not 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.

which 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." *See* 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). 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 party's claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.[4] *See* Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

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[4]The 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 requested information. *See* 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).

The district has submitted "a document generated by Pickett which sets out the categories of available and confidential information." This document specifies the categories of information that Pickett believes constitute "thought process," "work papers," and/or "proprietary software." The district has also submitted an affidavit from an employee of Pickett who states that the company "subscribes, at substantial cost, to commercial databases and incorporates the data from numerous sources by way of Pickett developed processes to enable reasonable estimates of property values." After reviewing these arguments and the submitted information, we find that Pickett has not established by specific factual evidence that any of the information at issue is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"); Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). As such, none of the information at issue may be withheld under section 552.110 of the Government Code.

We next address the district's claim under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You "believe that all or portions of the [submitted] information" are confidential under section 22.27 of the Tax Code. This section states in pertinent part as follows:

> (a) Rendition statements, real and personal property reports, attachments to those statements and reports, and other information the owner of property provides to the appraisal office in connection with the appraisal of the property, including income and expense information related to a property filed with an appraisal office and information voluntarily disclosed to an appraisal office or the comptroller about real or personal property sales prices after a promise it will be held confidential, are confidential and not open to public inspection. The statements and reports and the information they

> contain about specific real or personal property or a specific real or personal property owner and information voluntarily disclosed to an appraisal office about real or personal property sales prices after a promise it will be held confidential may not be disclosed to anyone other than an employee of the appraisal office who appraises property except as authorized by Subsection (b) of this section.

Tax Code § 22.27(a). The records at issue contain information about specific real or personal property and property owners. You represent that some of this information was obtained from property owners under promises of confidentiality for the purpose of completing mineral appraisals. We note that the requestor asserts that section 22.27 is not applicable on the basis of Open Records Decision No. 550 (1990). In Open Records Decision No. 550, this office determined that section 22.27 was not applicable because the records at issue in that instance involved "[i]nformation compiled by a private market research firm . . . as part of a commercial transaction." *See* ORD 550 at 7. Here, the information was not compiled by a "private market research firm" in connection with a "commercial transaction," but rather was compiled by an appraisal firm for tax purposes as contemplated by section 25.01(b) of the Tax Code. *See* Tax Code § 25.01(b) (chief appraiser may contract with private appraisal firm to perform appraisal services for district). The requestor also asserts that information subject to "[s]ection 22.27 should lose its confidential nature when it is reformatted and combined with other information such that it can no longer be identified as information that was provided by an operator under [s]ection 22.27." However, this section expressly provides that information an "owner of property provides to the appraisal office in connection with the appraisal" is confidential and does not indicate the information loses its confidential character "if reformatted and combined with other information." *See* Tax Code § 22.27. As such, we find that section 22.27 is applicable here.

Therefore, upon review of the submitted information and arguments, we conclude that, to the extent the requested information was provided by property owners with the understanding that it would be kept confidential *and* is not otherwise subject to section 25.01(c) of the Tax Code, then such information must be withheld under section 552.101 of the Government Code in conjunction with section 22.27(a) of the Tax Code. The remaining information at issue 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 ten 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).

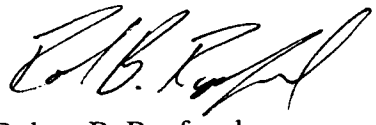
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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 ten calendar days of the date of this ruling.

Sincerely,



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RBR/krl

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Enc. Submitted documents

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