ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2005

Mr. Kirk Swinney
McCreary, Veselka, Bragg & Allen, P.C.
5929 Balcones Drive, Suite 200-A
Austin, Texas 78731

OR2005-10635

Dear Mr. Swinney:

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# 236892.

The Crockett 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 state that with the exception of the net revenue interest information, the district will release the 2004 and 2005 mineral appraisal rolls and "year by year" mineral appraisals. You assert that some of the requested information may involve the third-party proprietary interests of Pritchard & Abbott, Inc. ("Pritchard"). Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the district notified Pritchard 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 the district does not maintain some of the requested information.[1] You claim that the remaining requested information need not be released in accordance with section 552.027 of the Government Code. Alternatively, you argue that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.[2] We have also considered comments submitted by the requestor and Pritchard. *See* Gov't Code §§ 552.304 (providing that interested party may submit comments stating why information should or should not be released), .305.

Initially, we address the district's claim that the submitted information is not subject to disclosure under the Act because the information is commercially available to the requestor. Section 552.027 of the Government Code provides:

> (a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.
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> (b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.
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> (c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. We have reviewed your arguments and the information at issue and find that you have failed to demonstrate the applicability of section 552.027 to that information. *See* Gov't Code § 552.027.

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[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).

[2]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.

Next, we understand you to state that most, if not all, of the requested information was prepared for the district by Pritchard, 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.

Pritchard claims that the remaining requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *See* Gov't Code § 552.104. However, we note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information at issue, and it may not be withheld on that basis. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Pritchard also raises section 552.110 of the Government Code for the remaining requested information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person

from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its competitors;
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> (5) the amount of effort or money expended by [the company] in developing this information; and

> (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 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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). This exception to disclosure 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. *Id.*

Pritchard has not submitted any arguments explaining that the remaining information meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business"). Furthermore, Pritchard has not submitted any arguments explaining that the remaining information is commercial or financial information, the release of which would cause Pritchard substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (1999) (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); *see also* Gov't Code § 552.301(e)(1). Accordingly, none of the information at issue may be withheld under section 552.110 of the Government Code.

Next, we address the district's arguments 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." This section encompasses information protected by other statutes. The district and Pritchard contend that some of the requested information is confidential under section 22.27 of the Tax Code. This section states in pertinent part:

> (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). You indicate that the submitted documents contain information which concerns specific real or personal property and property owners. You state that "a great deal of the information[,]" including the net revenue interest information, was either "acquired under confidentiality agreements with multiple property owners[,]" or it "concerns the appraisal of property and was acquired from the owner." We note that Pritchard states that "the full working interest and royalty interest decimal percentages" come directly from division order information obtained by Pritchard under confidentiality agreements pursuant to section 22.27. 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 id.* § 22.27. As such, we find that section 22.27 is applicable to the net revenue interest information, as well as the full working interest and royalty interest decimal percentages.

Therefore, upon review, we conclude that, to the extent the net revenue interest information and full working interest and royalty interest decimal percentages were provided by property owners with the understanding that they would be kept confidential *and* are 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. We note, however, that neither the district nor Pritchard has specifically indicated

which portions of the remaining information are confidential under section 22.27. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Therefore, because neither the district nor Pritchard has indicated which portions of the remaining information are confidential under section 22.27, none of it may be withheld under section 552.101 on that basis.

The district also asserts that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Finally, the district asserts that the requested information need not be released in the format desired by the requestor. The requestor states that he is "requesting the information in a format that [he] will be able to readily import into a database[.]" The district informs us that the requested information is available in PDF form, but that it does not have the ability to provide the information in the requested electronic format. The requestor states that PDF form is not acceptable, and suggests that some of the information is maintained by Pritchard in the requested electronic format. While you acknowledge that Pritchard may maintain the requested information in the requested electronic format, you inform us that the district has no right under its contract with Pritchard to access the information in that format. Accordingly, because the district does not have the technological capability to provide the requested information in the requested format, and because the district does not have a right of access to that information in the requested format, we find that the district need not release the requested information in the requested electronic format.[3] *See* Gov't Code §§ 552.228(a) (the Act requires a governmental body to provide a "suitable copy" of public information), .228(b) (a governmental body must provide requested information in an electronic format if the governmental body has the technological ability to do so, it is not required to purchase software or hardware to do so, and the provision of the information will not violate any copyright agreement).

In summary, to the extent that the net revenue interest information and full working interest and royalty interest decimal percentages were provided by property owners with the understanding that they would be kept confidential *and* are not otherwise subject to section

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[3]We note that you state that the district has "offered to provide estimates of compiling the [non-confidential] material in manipulable media if [the requestor] clarifies his request." You also indicate that the Terry County Appraisal District "has provided [the requestor with] an estimate . . . for compiling all of the non-confidential data into an electronic media[.]"

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 must be released to the requestor. In doing so, however, the information must be released in accordance with applicable copyright laws for any information protected by copyright.

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, 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 10 calendar days of the date of this ruling.

Sincerely,

James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 236892

Enc. Submitted documents

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