

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2006

Ms. Lori Robertson
Linebarger Goggan Blair & Sampson, LLP
P.O. Box 17428
Austin, Texas 78760

OR2006-09712

Dear Ms. Robertson:

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# 257460.

The Brown County Appraisal District (the "district"), which you represent, received a request for information relating to 2006 sales in the district. The district claims that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. The district also believes that this request for information implicates the interests of the Brownwood Board of Realtors (the "board"). The district notified the board of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from an attorney for the board. We have considered all of the submitted arguments and have reviewed the information you submitted.²

¹See 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).

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we address the district's obligations under section 552.301 of the Government Code. 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 a governmental body to request the attorney general's decision and state its claimed exceptions to disclosure 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). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

Because the district did not request this decision within the ten-business-day period prescribed by section 552.301(b), the submitted information is presumed to be public under section 552.302. This statutory presumption 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). Because the claims of the district and the board can provide compelling reasons for non-disclosure, we will address the parties' arguments.

We begin with the board's assertion of section 552.027 of the Government Code. Section 552.027(a) provides that "[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." Gov't Code § 552.027(a). Section 552.027 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. The legislative history of this provision notes that section 552.027 should exclude from the definition of public information

books and other materials that are also available as research tools elsewhere to any member of the public. Thus, although public library books are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added). Thus, section 552.027 excludes commercially available research material from the definition of "public information."

The board claims that responsive information obtained from the local Multiple Listing Service (the "MLS") is subject to section 552.027. We note, however, that access to a local

MLS is generally limited to licensed real estate brokers and appraisers. When access to information is limited to certain licensed individuals, such information cannot be said to be available “to any member of the public.” *Id.* Therefore, we are unable to conclude that section 552.027 is applicable to the submitted MLS information. Nevertheless, to the extent that the MLS information is, in fact, available to any member of the public, we agree that such information falls within the scope of section 552.027 and need not be released. To the extent, however, that access to the MLS information is limited to particular individuals, the information is not subject to section 552.027 and must be released unless it falls within an exception to public disclosure. *See* Gov’t Code § 552.002.

Next, we address the claimed exceptions to disclosure. Section 552.101 of the Government Code exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information that other statutes make confidential. Both the district and the board raise section 552.101 in conjunction with section 22.27 of the Tax Code, which provides in 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). We understand that the district is an “appraisal office” for purposes of section 22.27. You state that the district obtained the submitted information from owners of property or other sources under “promises of confidentiality.” You state that the information in Exhibit B is a portion of an internal ratio study prepared by the district that sets forth the sale prices of specific properties identified by legal description, street address, and sales date. You state that the information in Exhibit C was obtained from the local MLS. You argue that all of the information in Exhibits B and C is confidential under section 22.27(a) of the Tax Code. The board also contends that Exhibit C is confidential under section 22.27(a).

Having considered these arguments, we conclude that to the extent that the information in Exhibit B was voluntarily disclosed to the district by property owners in connection with an appraisal of property, after a promise of confidentiality, such information is confidential under section 22.27(a) of the Tax Code. The district must withhold any such information under section 552.101 of the Government Code. However, any information in Exhibit B that was not voluntarily disclosed to the district by property owners in connection with an appraisal of property, after a promise of confidentiality, is not confidential under section 22.27(a) and may not be withheld on that basis under section 552.101.

With respect to Exhibit C, we note that information obtained from the MLS does not constitute "information the owner of property provides to the appraisal office in connection with the appraisal of the property." Tax Code § 22.27(a). Therefore, because the MLS information in Exhibit C does not fall within the scope of section 22.27(a), the information in question is not made confidential by the statute, and the district may not withhold any of the information in Exhibit C under section 552.101 of the Government Code.

Both the district and the board also raise section 552.110 of the Government Code. This exception protects the proprietary interests of private parties with respect to 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). If a governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept

a private person's claim for exception as valid under section 552.110(a) if the 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). 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 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).

Both the district and the board contend that the MLS information constitutes a trade secret under section 552.110(a). However, neither the district nor the board has demonstrated that any of the information in question may be withheld on that basis. The district also asserts that release of the MLS information would cause the board competitive harm. However, the district has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information in question would result in substantial competitive injury. We therefore conclude that the district may not withhold any of the information in Exhibit C under section 552.110 of the Government Code.

The district also states that the MLS information is protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. See Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright

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).

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) to the extent that the MLS information is available to any member of the public, such information falls within the scope of section 552.027 of the Government Code and need not be released; and (2) to the extent that the information in Exhibit B was voluntarily disclosed to the district by property owners in connection with an appraisal of property, after a promise of confidentiality, the district must withhold any such information under section 552.101 of the Government Code in conjunction with section 22.27(a) of the Tax Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

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).

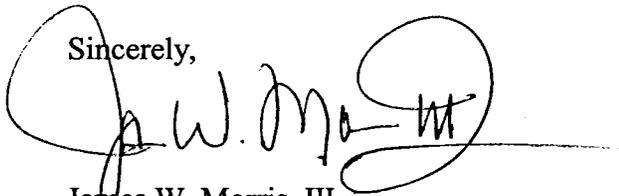
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and "M".

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

JWM/sdk

Ref: ID# 257460

Enc: Submitted documents

c: Ms. Abbigail Pendergraft
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SEP 21 2009 TR

CAUSE NO. D-1-GN-06-003321

At 1:39 M.
Amalia Rodriguez-Mendoza, Clerk

BROWN COUNTY APPRAISAL
DISTRICT,

Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL,

Defendant.

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IN THE DISTRICT COURT

261ST JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Brown County Appraisal District and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552 (West 2004 & Supp. 2008). The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Abbigail Pendergraft, was sent reasonable notice of this setting and of the parties' agreement that the District may withhold the information at issue; that the requestor was also informed of, and did exercise, her right to intervene in the suit to contest the withholding of this information. However, upon Plaintiff's motion, requestor's intervention was struck on September 2, 2009. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

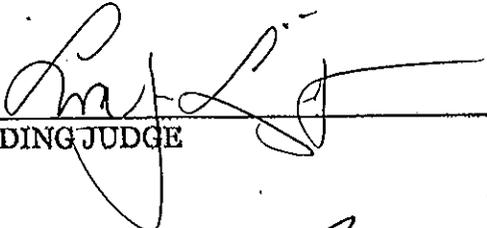
1. The information at issue, specifically, an electronic copy of the 2006 sales that

are maintained by the District, that the District obtained from a private entity that is not the property owner, is excepted from disclosure under Tex. Gov't Code § 552.148(a);

2. The District may withhold from the requestor the information at issue;
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff

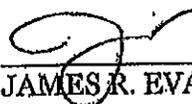
and Defendant and is a final judgment.

SIGNED this the 21st day of September, 2009.



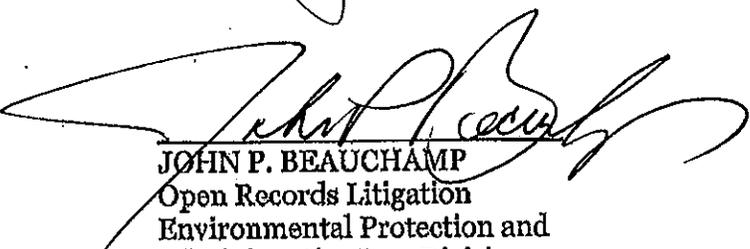
PRESIDING JUDGE

APPROVED:



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