



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2007

Mr. Jason L. Mathis
Cowles & Thompson P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2007-08534

Dear Mr. Mathis:

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# 283431.

The City of Addison (the "city"), which you represent, received a request for records related to the North Texas Super Bowl XLV Bid Committee and its proposal to the National Football League to host the 2011 Super Bowl. You state that the city does not have some of the requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.107, 552.110, and 552.131 of the Government Code and protected under Texas Disciplinary Rule of Professional Conduct 1.05.² You also inform us that you notified all of the interested third parties of the city's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). InterContinental

¹We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Although you raise section 552.101 in conjunction with the attorney-client privilege, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (1988).

Hotel Dallas (“InterContinental”) asserts that its information in the submitted documents is excepted under sections 552.101 and 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the city’s obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. The city received the request for information on April 17, 2007; however, you did not request a decision from this office until May 3, 2007. *See* Gov’t Code § 552.301(b). Thus, the city failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.104, 552.105, 552.107, and 552.131(b) of the Government Code are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See* Open Records Decision No. 676 at 12 (2002) (attorney-client privilege under section 552.107 or rule 503 constitutes compelling reason to withhold information under section 552.302 only if information’s release would harm third party), 592 at 8 (1991) (statutory predecessor to section § 552.104 subject to waiver), 564 (1990) (statutory predecessor to section 552.105 protects governmental body’s interest and is subject to waiver); *see also* Open Record Decision Nos. 665 at n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). In failing to comply with section 552.301, the city has waived its claims under sections 552.104, 552.105, 552.107, and 552.131(b); therefore, the city may not withhold the submitted information under these sections. But sections 552.101, 552.110, and 552.131(a) can provide compelling reasons to overcome this presumption; therefore, we will consider whether these sections require the city to withhold the submitted information.

InterContinental and the city assert that the information at issue is excepted under section 552.101 of the Government Code, which excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” We note, however, that section 552.101 does not encompass rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. *See* Open Records Decision Nos. 676 at 1-3, 575 at 2 (1990), 416 at 6-7 (1984). InterContinental also does not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or

stating that information shall not be released to public). Therefore, the city may not withhold any of the submitted information under section 552.101 of the Government Code.

InterContinental and the city assert that the information at issue is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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. 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); *see also Huffines*, 314 S.W.2d at 776. 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 RESTATEMENT OF TORTS § 757 cmt. b (1939). 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

³The following are the six factors that the Restatement gives 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 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).

section 552.110(a) applies 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) 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).

Having considered your arguments and those of InterContinental, we find that neither the city nor InterContinental has shown that any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find that the city and InterContinental have made only conclusory allegations that release of the information at issue would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, the city may not withhold any of the submitted information under section 552.110.

You also assert that some of the submitted information is excepted from release under section 552.131(a) of the Government Code. Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov’t Code § 552.110(a)-(b). Because neither the city nor any of the interested third parties has demonstrated that the submitted information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code or made the specific factual or evidentiary showing required under section 552.110(b) of the Government Code that the release of the information at issue would result in substantial competitive harm, we conclude that the city may not withhold any of the submitted information pursuant to section 552.131(a).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining interested third parties has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of any of these companies, and the city may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial

competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We note that the submitted information contains an account number. Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” The city must withhold the account number we have marked under section 552.136.

Finally, we note that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. One of the submitted e-mail addresses does not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to its release. Therefore, the city must withhold the e-mail address we have marked under section 552.137.

To conclude, the city must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code. The city must release the remaining information to the requestor.

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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jb

Ref: ID# 283431

Enc. Submitted documents

c: Mr. Jeff Mosier
Dallas Morning News
c/o Jason L. Mathis
Cowles & Thompson P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202-3793
(w/o enclosures)

Mr. Richard A. Illmer
Brown & McCarroll, L.L.P.
2001 Ross Avenue, Suite 2000
Dallas, Texas 75201-6929
(w/o enclosures)