



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2007

Ms. Meagan R. Santee  
Assistant City Attorney  
City of Abilene  
P.O. Box 60  
Abilene, Texas 79602-0060

OR2007-10290

Dear Ms. Santee:

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# 286332.

The City of Abilene (the "city") received a request for swimming pool drawings for three specific addresses.<sup>1</sup> You claim that release of the requested information may implicate the proprietary interests of third parties, Robert Karrh and Charles Doby, although the city takes no position as to whether the information is excepted from disclosure.<sup>2</sup> You state and provide documentation showing that you notified Mr. Karrh and Mr. Doby of the request and of the right of each to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely

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<sup>1</sup>We note that the city received a clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>Although the city raises section 552.101 of the Government Code, you have provided no argument explaining how this exception is applicable to the submitted information. Therefore, we presume you no longer assert this exception to disclosure. Gov't Code §§ 552.301, .302.

on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Mr. Karrh, who argued for protection of his own and Mr. Doby's information. We have considered the claimed exceptions and reviewed the submitted information.<sup>3</sup>

Initially, we note that some of the information you have submitted to us for review is not responsive to the clarified request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request.

Next, 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. *Id.* § 552.301(b). You explain that the city received the request on April 23, 2007. On April 27, 2007, the city asked the requestor to clarify his request. *See id.* § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). Thus, the ten-day time period to request a decision under section 552.301(b) was tolled on April 27, 2007. *See id.* § 552.301(b); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). The city received the requestor's clarification on May 24, 2007; consequently, the ten-business-day period resumed on May 25, 2007. According to the postmark on the envelope in which the requested information was submitted to this office, the city did not request a ruling until June 5, 2007. *See Gov't Code* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). You do not inform us that the city was closed for any of the business days between April 23, 2007, and June 5, 2007. Thus, by not requesting a ruling within ten business days, 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 id.* § 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

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<sup>3</sup>We note that you have only submitted pool drawings for two of the requested addresses. We assume that, to the extent pool drawings for the third address existed when the city received the request for information, you have released them to the requestor. If not, then you must do so immediately. *See Gov't Code* §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

Records Decision No. 150 (1977). We will consider whether third-party interests require the city to withhold the submitted information.

Mr. Karrh argues that some of the responsive information is excepted under section 552.104 of the Government Code. We note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 city does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the city may not withhold any of the responsive information pursuant to section 552.104.

Mr. Karrh also claims that the responsive information reveals the plans for water features that he designed for Paradise Pools and Spa (“Paradise”) and is excepted from disclosure under section 552.110(a) of the Government Code. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939). The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (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. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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 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).

Having considered Mr. Karrh's arguments and reviewed the information at issue, we find that Mr. Karrh has not 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. Thus, none of the information at issue may be withheld pursuant to section 552.110(a). Accordingly, the city must release the responsive 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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/mcf

Ref: ID# 286332

Enc: Submitted documents

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