



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2007

Mr. John D. Gilliam
First Assistant City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2007-15667

Dear Mr. Gilliam:

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# 295963.

The City of Plano (the "city") received a request for the completed application forms of the five most recent companies applying for a tax abatement. You state that you have provided one of the completed applications to the requestor. You claim that the remaining four applications are excepted from disclosure under section 552.131 of the Government Code.¹ While you also raise section 552.110 of the Government Code as a possible exception to disclosure, you make no arguments and take no position regarding the applicability of this exception. Instead, you state that release of the submitted information may implicate the proprietary interests of the companies whose applications are at issue. Accordingly, you inform us, and provide documentation showing, that you notified Krpton Solutions, L.L.C. ("Krpton"), Cadbury Adams USA, L.L.C. ("Cadbury"), Capital One National Association ("Capital One"), and Blue Cross Blue Shield of Texas ("Blue Cross") of the request for information and of the right of each of these companies to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d)

¹We note that although you also raise section 552.101 of the Government Code, you make no arguments in support of this exception. Thus, the city has not demonstrated that any of the submitted information is confidential for purposes of section 552.101. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

(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 to disclosure in certain circumstances). We have received comments from Cadbury, Capital One, and Blue Cross. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Krpton explaining why its requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes Krpton's proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See id.* § 552.110; 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).

Next, Cadbury claims that its information is protected under section 552.110 of the Government Code. 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 id.* § 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;
- (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 to [its competitors];
- (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. ORD 552. 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.* § 552.110(b); Open Records Decision No. 661 (1999).

Upon review of Cadbury’s arguments and the information at issue, we conclude that Cadbury has failed to establish a *prima facie* case that any of the submitted information is a trade

secret. *See* ORD 402. In addition, Cadbury has made only conclusory allegations that release of the information at issue would cause substantial competitive injury and has 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.

Cadbury also claims section 552.101 of the Government Code as an exception to disclosure. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Cadbury has not directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code.

The city, Cadbury, Capital One, and Blue Cross also claim that the submitted information is protected under section 552.131 of the Government Code. Section 552.131(b) provides that “[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].” Gov’t Code § 552.131(b). You inform us that the submitted information relates to pending economic development negotiations involving the city and the four companies at issue. We note, however, that an application for tax abatement constitutes a proposed incentive requested by the applicant. Section 552.131(b) only excepts those incentives offered to the business prospect by a governmental body or another person; it does not except incentives requested by the business prospect. We therefore conclude that the city has failed to demonstrate the applicability of section 552.131(b) to the tax abatement applications, and they may not be withheld on that basis. Furthermore, section 552.131(b) protects the interests of governmental bodies and not those of private third parties. Accordingly, no portion of the submitted information is excepted under section 552.131 of the Government Code.

We note that the submitted information includes e-mail addresses subject to section 552.137 of the Government Code.² 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). Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be a type specifically excluded by section 552.137 (c). Accordingly, the city must withhold the e-mail addresses that we have

²The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked pursuant to section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary, the city must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code. The remaining submitted information 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 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 "A. Meesey", written in a cursive style.

Allan D. Meesey
Assistant Attorney General
Open Records Division

ADM/eeg

Ref: ID# 295963

Enc. Submitted documents

c: Mr. Jack Lagos
3120 Oxford Court
Plano, Texas 75023
(w/o enclosures)