



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 7, 2010

Mr. Marcus W. Norris  
City Attorney  
City of Amarillo  
P.O. Box 1971  
Amarillo, Texas 79105-1971

OR2010-13507

Dear Mr. Norris:

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# 392776.

The City of Amarillo (the "city") received two requests from two requestors for an aquatics feasibility study. Although the city takes no position on the public availability of the submitted information, the city states that the information at issue may implicate the interests of a third party. Accordingly, the city states, and submits documentation showing, that the city notified Panhandle Aquatics, Inc. ("PA") of the request for information and of its right to submit arguments to this office as to why its submitted information should not be released. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from PA. We have considered the submitted arguments and reviewed the submitted information.

Initially, PA claims the submitted feasibility study is not public information subject to the Act. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

PA claims the submitted study was not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by or for a governmental body. In addition, PA claims the city does not own or have a right of access to the submitted study. We disagree. Information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a). The city states, and PA acknowledges, it contributed \$20,000 to the cost of the submitted study, out of a total cost of approximately \$65,000, because it has "some interest in swimming and the potentiality of an aquatics center."<sup>1</sup> PA states it provided the city a copy of the study because it is considering a joint venture with the city. The city further states that city staff and the city commission have reviewed and discussed the report but have yet to determine "whether to proceed with a public-private partnership or a location for any such [aquatics] center." Accordingly, we find that the submitted study, which is in the physical possession of the city, is maintained by the city in connection with the transaction of official business. Therefore, the submitted study is subject to the Act and must be released, unless it falls within the scope of an exception to disclosure. *See id.* §§ 552.301, .302.

PA also asserts that the submitted study is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of a private party such as PA. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold the submitted study under section 552.104 of the Government Code.

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<sup>1</sup>The city's brief dated June 29, 2010 states "the city and [the Amarillo Independent School District] contributed \$20,000 each to the cost of the study and [PA] paid the balance of approximately \$25,000."

PA also raises section 552.105 of the Government Code, which excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note section 552.105 is also 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. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose); *see also* Open Records Decision 522 (1989). As the city does not raise section 552.105, we find this section does not apply to the submitted study. *See* ORD 564 (governmental body may waive statutory predecessor to section 552.105).

PA also asserts that the submitted study is excepted 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 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; *see* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception is made, and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision 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. *See* 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. *See* Open Record Decision No. 661 (1999).

PA argues that the submitted study constitutes a protected trade secret. We find PA has failed to demonstrate how any portion of the submitted study meets the definition of a trade secret, nor has PA demonstrated the necessary factors to establish a trade secret claim for the submitted study. *See* Open Records Decision No. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Information such as this study is generally not

a trade secret because 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.” *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776. Therefore, the city may not withhold any portion of the submitted study pursuant to section 552.110(a) of the Government Code.

PA has also failed to provide specific factual evidence demonstrating that release of any portion of the submitted study would result in substantial competitive harm to the company. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the city may not withhold any portion of the submitted study pursuant to section 552.110(b) of the Government Code.

PA asserts that the submitted study is excepted under section 552.131 of the Government Code, which relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the 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. 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.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). As previously noted, PA has failed to demonstrate the applicability of section 552.110; thus, the city may not withhold any portion of the submitted study under section 552.131(a) of the Government Code.

We note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the city does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the submitted study is excepted under section 552.131(b) of the Government Code.

PA indicates that the submitted study is excepted from disclosure pursuant to federal copyright law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, including federal law. However, we note that, generally, copyright law does not make information confidential but instead gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. *See* Open Records Decision No. 660 at 5 (1999). A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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. As no further exceptions to disclosure have been raised, the submitted study must be released, but any information protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 392776

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

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