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OR2010-14521

Dear Mr. McFarland, Mr. Bullock, Mr. McKamie, and Mr. Wieneskie:

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# 393377.

The City of Euless (the "city"), which you represent, received two requests for information related to a specified economic development project.¹ The second request also seeks information related to certain open records requests, communications between the city and specified entities and individuals, and communications related to a named family during a specified time period, as well as communications related to the exploration and drilling for oil and gas. You state you will release most of the requested information upon the

¹As you have not submitted the first request for our review, we take our description from your brief.

requestors' responses to cost estimates. You claim the submitted information is excepted from disclosure under sections 552.111 and 552.131 of the Government Code. You also state that release of the requested information may implicate the proprietary interests of third parties, including Rubloff Development Group, Inc. and its related entity, Glade 121, L.P. ("Glade"). Therefore, you inform us that you notified the third parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See 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). We have received comments from Glade. 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. *See Gov't Code § 552.301(b)*. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). In this instance, you state the city received the first request on June 15, 2010. Accordingly, the tenth business day was June 29, 2010. You did not request a ruling on the first request until July 1, 2010. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). In addition, as of the date of this letter, you have not submitted to this office a copy of the first written request for information. Consequently, we find the city failed to comply with the procedural requirements of section 552.301 with regards to the first request.

Pursuant to section 552.302 of the Government Code, the submitted information responsive to the first request is therefore 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; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when 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). You claim exceptions to disclosure under sections 552.111 and 552.131(b) of the Government Code, which are discretionary exceptions that protect a governmental body's interests and may be waived, for information responsive to the first request. *See Gov't Code*

§ 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). We note that in waiving sections 552.111 and 552.131(b) for information responsive to the first request, the city also waived sections 552.111 and 552.131(b) with respect to the same information responsive to the second request. Accordingly, the city may not withhold any information that is responsive to the first request under sections 552.111 and 552.131(b) of the Government Code. As the city only claims section 552.111 for information responsive to both requests, the city may not withhold any of the submitted information under this section. We note some of the information at issue may be excepted from disclosure under section 552.137 of the Government Code.² Because this section and third party interests can provide compelling reasons to withhold information, we will consider whether any of the information responsive to both requests must be withheld on any of those grounds. In addition, we will consider your arguments under section 552.131(b) of the Government Code for information only responsive to the second request.

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 previously noted, we have received comments from Glade. However, as of the date of this letter, we have not received comments from any of the remaining third parties explaining why any of the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining interested third parties has protected proprietary interests in the submitted information. *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. Consequently, the city may not withhold any of the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

To the extent any portion of the submitted information is not encompassed by the first request, we address your claim under section 552.131(b) of the Government Code, which provides as follows:

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business

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

prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. You state the submitted information is related to possible incentives being requested by a third party. We note 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. You acknowledge that the city has not offered these considered incentives to any business prospect. In addition, it is not apparent from the information itself how it constitutes financial or other incentives being offered to a business prospect. Therefore, we find that the city has failed to meet its burden under section 552.131(b). Thus, the city may not withhold any of the submitted information under section 552.131(b) of the Government Code.

Now, we turn to Glade's arguments against disclosure of the submitted information. Glade indicates there was an expectation its submitted information would be kept confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Glade claims its submitted information is excepted under section 552.110 of the Government Code, which 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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. *Id.*; *see also* ORD 661 at 5-6 (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).

Glade claims its information is excepted under section 552.110(a) of the Government Code. After reviewing the submitted information and arguments, we determine that Glade has

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).

failed to demonstrate that any of its submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for its submitted information. Accordingly, the city may not withhold any of the submitted information under section 552.110(a).

Glade also claims its information is excepted under section 552.110(b) of the Government Code. Glade states the information it collected regarding revenues and taxes enables it to have "a competitive advantage over rival developers who have not invested the time and money," and that its analyses allow it to present "the most attractive development plans to regulatory and governmental entities." Further, Glade states that release of this information would permit its rivals to gain insight that would allow them to undercut Glade in negotiations. Upon review of Glade's arguments and its information at issue, we find Glade has established that the information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the city must withhold this marked information under section 552.110(b) of the Government Code. However, we find Glade has made only conclusory allegations that the release of the remaining submitted information it seeks to withhold would result in substantial damage to its competitive position. Thus, Glade has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* ORD 661. Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

Section 552.137 of the Government Code 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 address at issue is not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.⁴

In summary, the city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must also withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure. The remaining information must be released.

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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, 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 393377

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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