



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2011

Mr. David V. Overcash
Wolfe, Tidwell & McCoy, LLP
2591 Dallas Parkway, Suite 205
Frisco, Texas 75034-8563

OR2011-09450

Dear Mr. Overcash:

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# 422850 (File No. C10001PIR20110414-01).

The Town of Fairview (the "town"), which you represent, received a request for (1) financial reports from the Town Council (the "council") for 2010 and 2011; (2) budgeting, accounting, revenue forecasting documents, and memoranda presented to the council for 2010 and 2011; (3) written town financial policies; (4) a feasibility study for a sports complex and the cost of the study; (5) presentations given by a named individual to the council during 2010 and 2011; (6) estimates of real estate taxes paid to the town from 2010 through 2015; and (7) a budget for the town for a specified period of time. You claim some of the submitted information is excepted from disclosure under sections 552.105 and 552.110 of the Government Code. You also assert the release of the submitted information may implicate the proprietary interests of The Sports Facilities Advisory, L.L.C. ("SFA"). Accordingly, you notified SFA of the request and of its opportunity to submit arguments to this office as to why its information should be excepted from public disclosure. *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). We have received comments from SFA. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the town did not submit any information responsive to items one through three and five through seven of the request. To the extent this information existed on the date the town received the request, we assume the town released it. If the town has not released any such information to the requestor, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

SFA argues information contained in the feasibility study and pro forma is confidential because the feasibility study and pro forma are subject to a confidentiality agreement between the town and SFA. We note information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

The town and SFA raise 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 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 No. 522 (1989). Thus, we will only address the town's arguments under this exception.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* ORDs 564, 357, 310. Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not

complete. *See* ORD 310. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

The town provides an affidavit from the town’s community development manager, stating the submitted feasibility study and five-year operating pro forma pertain to the potential acquisition of a property for a potential indoor sports complex. The town indicates it has made a good-faith determination that disclosure of this information would damage the town’s negotiating position with regard to the acquisition of properties needed for the development of this particular project. We understand the potential sites for this project have not been disclosed. Based on these representations and our review, we conclude the town may withhold the information you have marked under section 552.105 of the Government Code.

The town and SFA raise section 552.110 of the Government Code. Although the town argues the remaining submitted information is excepted from disclosure under section 552.110, this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we only address SFA’s arguments under section 552.110. 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 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* Open Records Decision No. 552 (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.¹ 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 section 552.110(a) is applicable unless it has been shown 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* 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).

SFA argues the remaining portions of the feasibility study and five-year operating pro forma constitute protected trade secrets. We find SFA has failed to demonstrate how any portion of the remaining information meets the definition of a trade secret, nor has SFA 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

¹The 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).

trade secret claim). Information such as a feasibility study or a five-year operating pro forma 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 town may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

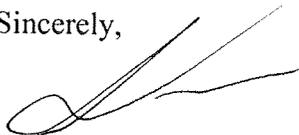
However, upon review of SFA’s arguments, we find SFA has established its formulae, found in the excel spreadsheets contained in the electronic version of the submitted information, constitute commercial or financial information, the release of which would cause SFA substantial competitive harm. Thus, the town must withhold the formulae in the excel spreadsheets in the electronic version of the submitted information under section 552.110(b) of the Government Code. We find SFA has failed to demonstrate how any of the remaining information at issue constitutes commercial or financial information the release of which will cause SFA substantial competitive harm. Consequently, the town may not withhold any of the remaining information under section 552.110(b).

In summary, the town may withhold the information you have marked under section 552.105 of the Government Code. The town must withhold the formulae in the excel spreadsheet in the electronic version of the submitted documents under section 552.110(b) of the Government Code. The remaining submitted information must be released.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/bs

Ref: ID# 422850

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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