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May 14, 2014

**Via Facsimile (512) 463-2092
and Regular Mail**

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: April 18, 2014 Open Records Request by Mr. Hal Barker

Dear Sir/Madam:

I represent the Dallas Arboretum and Botanical Society, Inc. ("Arboretum"). The Arboretum objects to the disclosure under the Texas Public Information Act (the "Act") of certain information--specifically its redacted -submitted to the City of Dallas with respect to a private financial transaction. The Arboretum's financial documents are excepted from disclosure under the Act because those documents are confidential financial information, are trade secrets and contain sensitive financial information. TEX. GOV'T CODE §§ 552.101 and 110.

BACKGROUND:

The Arboretum is a private, non-profit entity that owns and operates the Dallas Arboretum gardens near White Rock Lake. As a non-profit entity, the Arboretum heavily relies on public donations for its revenue. The Arboretum could not function with these public donations. The Arboretum is not a governmental body and it is not subject to the Act. TEX. GOV'T CODE § 552.002(a). It does not compile or maintain information for any governmental entity and it does not have any "public information" subject to the Act. Id.

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On or about April 18, 2014, the City received an open records request relating to any funding for the construction of the Arboretum parking facility. On April 30, 2014, the City, through its Assistant City Attorney Heather Silver, requested an opinion from your offices as to whether the Finance Documents were exempted from disclosure under the Act. See TEX. GOV'T CODE § 552.301. The City notified the Arboretum of its opportunity to present any applicable exceptions to the disclosure of the Arboretum's financial information under the Act. TEX. GOV'T CODE § 552.305(d). The Arboretum objects to the disclosure of its confidential information under the Act within ten days after its receipt of the City's notice. TEX. GOV'T CODE § 552.305(d)(2)(B).

APPLICABLE LAW:

The Arboretum's Finance Documents are excepted from disclosure as a judicially recognized trade secret under Section 552.110(a) of the Act, and, separately, as competitively sensitive financial information under Section 552.110(b) of the Act.

Section 552.110(a) excepts information from the Act's public disclosure requirements trade secrets that are "privileged or confidential by statute or judicial decision." TEX. GOV'T CODE § 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. 1958).

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.

Id. All six of these factors need not be present; rather, each factor is part of the overall analysis in determining what a trade secret is. In Re Bass, 113 S.W.3d 735, 740 (Tex. 2003). If prima facie evidence establishes a trade secret, then the attorney general must protect that information from disclosure. TEX. GOV'T CODE § 552.110(a); Tex. Att'y Gen. OR1990-552 ("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").

Under these authorities, the Texas judiciary has routinely held that a company's financial information is a protected trade secret under Texas law. See, e.g., Sharma v. Vinmar Int'l, Ltd., 231 S.W.3d 405, 413 (Tex. App.--Houston [14th Dist.] 2007, no pet.) (financing terms, among other items, trade secrets); In re Wood, 2006 Tex. App. LEXIS 2006, *15 (Tex. App.--Houston [1st Dist.], Mar. 14, 2006) (orig. proceeding) (and cases cited therein).

Separately, as a result of these judicial decisions, the Arboretum's Finance Documents are also excepted from disclosure under Section 552.101 of the Act. TEX. GOV'T CODE § 552.101 (information is excepted from public disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.")

Section 552.110(b) protects any commercial or financial information--trade secret or otherwise--from the Act's public disclosure requirements if the release of that information "would cause substantial competitive harm" to the information's owner. TEX. GOV'T CODE § 552.110(b); see also 5 U.S.C. § 552(b)(4). Under this section, if a prima facie, specific factual showing is made that substantial competitive injury would likely result from release of information, then the attorney general must protect that information from disclosure. TEX. GOV'T CODE § 552.110(b); see also National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

Apart from encouraging cooperation with the Government by persons having information useful to officials, [the financial records exception] serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.

Id. at 768.

The Attorney General has applied this section to exempt financial information from disclosure. Tex. Att’y Gen. Op. OR2008-15218; Tex. Att’y Gen. Op. OR2008-12864. For example, a construction company’s financial statements were excepted from disclosure when competitors could utilize those statements to calculate the company’s ability to bid on construction projects. Tex. Att’y Gen. Op. OR2001-5257. Likewise, a private company’s financial documents that reveal profitability margins, resource allocations and other competitive data were exempt from disclosure. Tex. Att’y Gen. Op. OR2003-2445. In short, if a company’s financial documents contain competitively sensitive information, those statements should be exempt from public disclosure. See, e.g., Tex. Att’y Gen. OR2007-16012; Tex. Att’y Gen. OR2007-14242; Tex. Att’y Gen. OR2005-10830; Tex. Att’y Gen. OR2005-10608; Tex. Att’y Gen. OR2005-03486.

ANALYSIS:

The Arboretum relies on the attached Affidavit of its President and Chief Operating Officer, Mary Brinegar, as prima facie evidence that its Finance Documents are trade secrets and, separately, confidential financial information.

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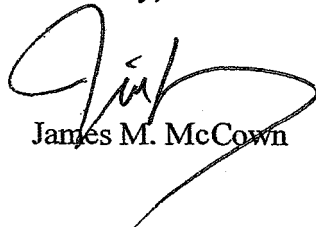
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In short, the Arboretum's Finance Documents are trade secrets and the Arboretum would be substantially harmed if that information became public or available to its critics or competitors. See TEX. GOV'T CODE § 552.110(a)(b); Sharma, 231 S.W.3d at 413; (Brinegar Aff. ¶ 9).

CONCLUSION:

The Arboretum respectfully requests that the Attorney General issue an opinion to the City of Dallas advising it that the Arboretum's Finance Documents are excepted from disclosure under of the Act. If you need any additional information or explanation on these issues, please let me know.

Sincerely,



James M. McCown

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cc: Heather Silver, Esq.
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