



April 30, 2014

Hal Barker
9191 Garland Road, # 1126
Dallas, Texas 75218
hbarker_2011@yahoo.com

Re: Request for an Open Records Decision

Dear Mr. Barker:

This letter responds to your open records request received by the city of Dallas on April 18, 2014, for information pertaining to the Arboretum Parking Garage. Some of the requested documents have been sent to the Attorney General for an open records decision regarding their release. A copy of the letter to the Attorney General is enclosed for your information. The Park and Recreation Department will provide you with the remaining requested information.

If you have any questions regarding this matter please contact me at 214-670-3519.

Sincerely,

A handwritten signature in cursive that reads 'Heather Silver'.

HEATHER SILVER
Assistant City Attorney

Attachments

c: Warren M. S. Ernst, City Attorney
Ileana Fernandez, Chief of the General Counsel Division
Carolyn Brescia, Park and Recreation Department
Jeri Carter, Public Information Office



April 30, 2014

Honorable Greg Abbott
Attorney General of Texas
300 W. 15th Street
Clements Building, 12th Floor
P.O. Box 12548
Austin, Texas 78711

Re: Request for an Open Records Decision

Dear Mr. Attorney General Abbott:

By email (Exhibit A) received by the city of Dallas ("city") on April 18, 2014, Hal Barker requested information pertaining to the Arboretum Parking Garage.

This office is responsible for representing the legal interests of the city. In our opinion, some of the requested information (Exhibit B) may be excepted from required public disclosure under Section 552.305 of the Public Information Act, Chapter 552, Texas Government Code (the "Act"). Under Section 552.305 of the Act, the city has provided written notice to the Dallas Arboretum & Botanical Society, Inc. that a request has been made for their company's proprietary information and that this requested information may be excepted from disclosure under Section 552.305 of the Act (Exhibit C). Under Sections 552.301 and 552.305 of the Act, this office now seeks your determination about whether this information is exempt from disclosure. Mr. Barker will be provided with the remaining requested information.

If you have any questions regarding this request for an open records decision please contact me at 214-670-3519.

Respectfully submitted,

A handwritten signature in cursive script that reads 'Heather Silver'.

HEATHER SILVER
Assistant City Attorney

Attachments

April 30, 2014
Honorable Greg Abbott
Page 2

c: (with Exhibits A and C only)
Warren M. S. Ernst, City Attorney
Ileana Fernandez, Chief of the General Counsel Division
Carolyn Brescia, Park and Recreation Department
Jeri Carter, Public Information Office

Hal Barker
9191 Garland Road, # 1126
Dallas, Texas 75218
hbarker_2011@yahoo.com

“EXHIBIT A”

Brescia, Carolyn

From: Hal Barker [hbarker_2011@yahoo.com]
Sent: Friday, April 18, 2014 12:00 PM
To: OpenRecords
Cc: Brescia, Carolyn
Subject: Texas Public Information Act Request

Greetings,

This is a request under the Texas Public Information Act.

The Dallas Arboretum is building a parking garage at or about 8726 Garland Road, Dallas, Texas 75218.

From what I have been able to determine, the Dallas Arboretum sold the property to the City of Dallas memorialized in a Warranty Deed records on or about July 29, 2013, prior to the construction of the Parking Garage.

Records requested:

I request all documents in the possession of the City of Dallas relating to any public or private placed bond, public loan, private loan, or other form of financing used to build the Arboretum Parking Garage under construction.

If City of Dallas Bond monies are being used to finance the construction, please provide me with all financial documents relating to those bonds and how those Bond monies were allocated.

If any entity of the City of Dallas secured private funding or guarantees for the Arboretum Parking Garage, please provide those records.

If any emails, written instruments, or other communications exist relating to any form of funding for the Arboretum Park Garage exist under the care and control of the City of Dallas, please provide those documents. These should include communications to and from any Park Board member, Park Board staff, engineers, or others involved related to any financial transactions relating to the Arboretum Parking Garage funding.

If the City of Dallas Park and Recreation Board engaged in any discussions, whether public or private, relating to funding in any form of the Arboretum Parking Garage, please provide me those records.

If the City of Dallas has provided any form of guarantee for payment of any portion of the financing costs, including interest, penalties, or any other commitment to guarantee using of City of Dallas public funds, please provide me those records.

In short, if any City of Dallas government funds from any source are allocated for the construction of the Dallas Arboretum Parking Garage, please provide me with those records.

I would first like to examine these records prior to purchasing records that I might desire to obtain.

Thank you.

Hal Barker
9191 Garland Road Apartment 1126
Dallas, TX 75218

Hbarker_2011@yahoo.com

“EXHIBIT C”



April 30, 2014

Mary Brinegar, President and CEO
Dallas Arboretum and Botanical Society, Inc.
8617 Garland Road
Dallas, Texas 75242

Dear Ms. Brinegar:

We have received a formal request from another party to inspect or copy some of our files. These files include papers we received from your company. The attorney general's office is reviewing this matter and they will issue a decision on whether Texas law requires us to release your papers. Generally, the law requires that we release all requested information, but there are exceptions. As described below, you have the right to object to the release of your papers, to submit briefing to the attorney general, and to argue that one or more exceptions apply to your papers. If you want to file any objections and briefing, you must do so immediately. If the attorney general's office does not receive your objections and briefing within 10 business days, it could conclude that no exception applies and they may rule that your papers must be released.

The requested information may be excepted from disclosure by sections 552.101, 552.110, 552.113, or 552.131 of the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. A copy of the request for information is enclosed for your inspection. Pursuant to section 552.301 of the Government Code, we are seeking an attorney general decision to determine whether we must release the requested information. We are providing the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act.

Under the Act, all information held by governmental bodies is open to public disclosure unless it falls within one of the Act's specific exceptions to disclosure. The Act places on the custodian of records the burden of demonstrating that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, in cases such as this one, where a third party's property interest is implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interests. Gov't Code § 552.305; Open Records Decision No. 542 (1990).

If you wish to claim that the requested information is protected proprietary information, you have the right to submit additional information or legal briefing to the attorney general. You are not required to submit briefing to the attorney general, but if you decide not to submit briefing, the Office of the Attorney General will presume that you have no property interest in the requested information. In other words, your failure to take timely action may result in the requested information being released to the public. If you decide to submit briefing, you must do so not later than the tenth business day after the date you receive this notice.

If you submit briefing to the attorney general, you must:

- a) identify the legal exceptions that apply,
- b) identify the specific parts of each document that are covered by each exception, and
- c) explain why each exception applies. Gov't Code § 552.305(d).

A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436. You may contact this office to review the information at issue in order to make your arguments. The Act does not require the attorney general to raise and consider exceptions that have not been raised. The attorney general is generally required to issue a decision within 45 working days. You must send your written comments to the Office of the Attorney General at the following address:

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

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code § 552.305(e).

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly-claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.110: Trade Secrets and Commercial or Financial Information

Trade Secrets:

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958)
Open Records Decision No. 552 (1990).

Commercial or Financial Information:

The commercial or financial information prong of section 552.110 was amended by the Seventy-six Legislature. The amendment became effective September 1, 1999. At the

time of publication of this form, there were no cases or opinions construing the amended provision.

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. Filed) (construing previous version of section 552.110).
National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).
Open Records Decision No. 639 (1996).

Section 552.113: Geological or Geophysical Information

Open Records Decision No. 627 (1994).

Section 552.131: Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the Public Information Handbook published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at 512-478-OPEN (6736) or toll-free at (877)-673-6839 (877-OPEN TEX). To obtain copies of the Public Information Handbook or Attorney General Opinions, please go to the attorney general's Web site at www.oag.state.tx.us or call the attorney general's Opinions Library at 512-936-1730.

Sincerely,



HEATHER SILVER
Assistant City Attorney

Enclosure: Copy of request for information

cc Hal Barker
9191 Garland Road, # 1126
Dallas, Texas 75218

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



April 30, 2014

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Re: Request for an Open Records Decision

Dear Mr. Barker:

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Sincerely,

A handwritten signature in cursive script that reads 'Heather Silver'.

HEATHER SILVER
Assistant City Attorney

Attachments

c: Warren M. S. Ernst, City Attorney
Ileana Fernandez, Chief of the General Counsel Division
Carolyn Brescia, Park and Recreation Department
Jeri Carter, Public Information Office



NESBITT,
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McCOWN, L.L.P.
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EMAIL: JMCCOWN@NVMLAW.COM

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.

redacted

Office of the Attorney General

May 14, 2014

Page 2

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.

redacted

Office of the Attorney General
May 14, 2014
Page 5

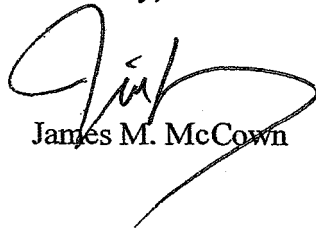
redacted

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

Office of the Attorney General

May 14, 2014

Page 6

cc: Heather Silver, Esq.
Assistant City Attorney
Dallas City Attorneys' Office
1500 Marilla Street, Room 7DN
Dallas, Texas 75201-6622
(redacted and without Brinegar Affidavit)

Mr. Hal Barker
9191 Garland Road, #1126
Dallas, Texas 75218
(redacted and without Brinegar Affidavit)