



Office of the Attorney General

State of Texas

December 13, 1996

DAN MORALES
ATTORNEY GENERAL

Mr. David Anderson
Chief Counsel
Texas Education Association
1701 North Congress Avenue
Austin, Texas 78701-1494

OR96-2400

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102348.

The Texas Education Agency ("TEA") received a request for four categories of information relating to a specific hearing before a special education hearing officer. The requestor modified his original request to ten of the exhibits used during the hearing. You seek to withhold five of these exhibits, specifically numbers 2, 3, 5, 8, and 14. You claim that the information is excepted from disclosure by section 552.110 of the Government Code. You also assert that TEA need not make the requested copies or allow the inspection of the information pursuant to section 552.027 of the Government Code. We have considered your arguments and have reviewed the documents at issue.

Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. Open Records Letter No. 96-0251 (1996). The legislative history of this provision notes that section 552.002 should exclude from the definition of public information

books and other materials that are also available as research tools elsewhere to any member of the public. Thus, although *public library books* are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added). Therefore, section 552.027 provides excludes commercially available research material from the definition of "public information." "Public information," however, as defined by section 552.002, must be produced for inspection or duplication or both, Gov't Code § 552.221, unless an applicable subchapter C exception applies to the information, *id.* §§ 552.101-.124; *see* Open Records Decision Nos. 565 (1990), 549 (1990), 470 (1987).

We have reviewed the information submitted for our consideration. The materials concern the techniques and methods of special education. They consist of two published journal papers, teaching guidelines, and a manual and video on behavior. We do not believe that the requested information is "a commercial book or publication purchased or acquired by the [TEA] for research purposes." The information appears to have been utilized by the TEA in connection with the transaction of official business. *See id.* § 552.002(a)(2) (defining public information). And, although the documents may be commercially available to the public, it is not apparent that TEA purchased or acquired them for research purposes in the same way that a telephone or library book would be. Accordingly, we do not believe that the requested documents are that kind of information covered by section 552.027.

You next contend that the information may be excepted from disclosure by section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

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 a single or ephemeral event 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); Open Records Decision No. 552 (1990).¹ As for the second prong of section 552.110, in Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. Open Records Decision No. 639 (1996) at 4.

You state that because much of the material appears to have a copyright, it will be protected under section 552.110 of the Government Code. We recognize, however, that the submitted information is not withheld from the public. On the contrary, the information at issue is available to the public and does not appear to be treated as undisclosable. Consequently, we do not believe that it is the kind of information protected as a trade secret or commercial and financial information under section 552.110. The TEA may not withhold the information pursuant to section 552.110

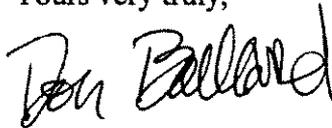
You have noted, nonetheless, that some of the material at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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. See Open Records Decision No. 550 (1990).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 102348

Enclosures: Submitted documents

cc: Ms. Cheryl Burkhardt
Marker's Business Records
802 North Carancahua, Suite 2250
Corpus Christi, Texas 78470-0800
(w/o enclosures)

Ms. Katherine Martinez-Vitela
Gary, Thomasson, Hall & Marks
P.O. Box 2888
Corpus Christi, Texas 78403
(w/o enclosures)