



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 18, 1998

Jim Ross, Ph.D.
Personnel Specialist
Mission Consolidated Independent School District
1201 Bryce Drive
Mission, Texas 78572-4399

OR98-3189

Dear Mr. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120576.

The Mission Consolidated Independent School District (the "district") received a request for the correspondence between the district and Mr. Ken Wethe. You assert that the responsive information is excepted from public disclosure by sections 552.101, 552.102, 552.104 and 552.110 of the Government Code; you also withhold information pursuant to section 552.305 of the Government Code on the basis of asserted proprietary rights of the third party, Mr. Wethe. You have supplied a representative sample of the responsive information.¹ We have considered the exceptions raised and the subject information.

Pursuant to section 552.305 of the Government Code, this office informed Mr. Ken Wethe of the request for information and his burden to submit argument in support of any proprietary interests he may allege in that information. Mr. Wethe responded, contending that the responsive information is excepted from disclosure by section 552.110 of the Government Code.

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first address the application of Section 552.101 of the Government Code to the responsive information. This section excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. It incorporates the doctrine of common-law privacy. Information is protected from public disclosure under the common-law right of privacy if (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). Section 552.102 of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, *writ ref'd n.r.e.*). Thus, 552.102 analysis is subsumed by 552.101 analysis. We note that you have claimed 552.102 as protective of information concerning the members of the insurance committee. Our review of the submitted information does not reveal any personnel information relating to that committee that warrants exception under the above analysis.

Section 552.101 also incorporates other statutory confidentiality provisions. Section 552.117 of the Government Code excepts from disclosure the home addresses, home telephone numbers, social security numbers, and information revealing the existence of family members of public employees who request that this information be kept confidential under section 552.024 of that code. If a current or former employee or official requested that this information be kept confidential it may not be released to the public. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

The Medical Practice Act, Section 5.08, V.T.C.S. article 4495b ("MPA"), controls disclosure of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. Such information may not be disclosed except as provided by the MPA.. V.T.C.S. art. 4495b, § 5.08(b). Access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). The department may only release this information in accordance with the MPA..

We now turn to the district's argument under section 552.104. This section protects the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). It is not designed to protect the interests of private parties that

submit information to a governmental body. *Id.* at 8-9. This provision states, “Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.” This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). A general allegation of a remote possibility that some unknown “competitor” might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 at 2 (1987). As the exception was developed to protect a governmental body’s interests, that body may waive section 552.104. *See* Open Records Decision No. 592 at 8 (1991). Portions of the submitted information appear to consist of materials and information used by the district in evaluating bid proposals. Your representations indicate that prospective bidders may discern the bid evaluation strategy of the district as it relates to the current bidding situation from this body of information, should it be released. As disclosure of this information would clearly negatively impact the interests of the district in obtaining the best bids, we are of the opinion that this information may be excepted pursuant to Government Code section 552.104. In reaching this conclusion we assume that the bidding process is still in progress. Once the competitive bidding process has ceased and a contract has been awarded, this exception no longer applies. Hence, if the subject contract has been awarded, section 552.104 does not except the subject information from disclosure.

Both the district and Mr. Wethe raise section 552.110 of the Government Code. Information not protected by section 552.104 of the Government Code may be protected under section 552.110. This provision protects the property interests of those supplying information to governmental entities 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.

For Open Records purposes “trade secret” has the meaning specified in section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). To wit:

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); In applying the “trade secrets” exception, our office held that a claim for this exception will be accepted when a third party making the claim asserts *factual* allegations sufficient to present a prima facie case for the exception, provided that a governmental body takes no position on the claim and no one submits an argument that rebuts that claim *as a matter of law*. Open Records Decision No. 552 (1990).

When applying the “commercial and financial information” grounds for exception to disclosure, this office applies the test for exemption 4 to the federal Freedom of Information Act, as articulated by *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Open Records Decision No. 639 (1996). Under that test, disclosure of 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.* However, a *National Parks* claim cannot be sustained by mere assertion of a possibility of commercial harm. *Id.* at 4. 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. *Id.*

Thus, a third party claimant to protection under either provision 552.110, must provide factual allegations in support of the claim. In the instant case, Mr. Wethe, the third party claimant, states that the subject information reveals evaluations, calculations and professional insights developed over 30 years. He also informs us that he is actively engaged in the business of consulting in the subject area and that disclosure of the information would seriously jeopardize the integrity of his review process. From a review of the subject information, we conclude that portions of the submitted information, as compiled, reveal techniques and procedures analogous to “a process or device for continuous use in the operation of the business” that Mr. Wethe is engaged in. We find that this third party has presented factual allegations sufficient to present a prima facie case that such information is a “trade secret.” We also conclude that a portion of the responsive information is “commercial information” and that the release of that information would “cause substantial harm to the competitive position of the person from whom the information was obtained..” While much of the submitted information would not warrant this exception were it not in a compiled form, we find that the compilation reveals the protected “process” and therefore such information may be withheld pursuant to section 552.110.

We have marked representative examples of types of information so as to identify the pertinent disclosure considerations in accordance with the above discussion.

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,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 120576

Enclosures: Marked documents

cc: Mr. William Rusteberg
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(w/o enclosures)