



August 23, 2001

Ms. Glenda Robinson Helfrich
Office of Vice Chancellor and General Counsel
Texas Tech University
3601 4th Street, Stop 6246
Lubbock, Texas 79430-6246

OR2001-3746

Dear Ms. Helfrich:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151092.

Texas Tech University (the "university") received a request for all documents in the possession of the university, including the Texas Tech University Health Science Center, that relate to Assured Indoor Air Quality, L. P. ("AIAQ"), or QIC Systems ("QIC"), or any funds or grants provided to the university by AIAQ or QIC. You state that the university will release approximately 1600 pages of information. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted documents.¹ We have also considered the comments submitted by the requestor and AIAQ.² See Gov't Code § § 552.304, .305 (permitting interested party to submit reasons why requested information should or should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

¹Your submission includes "sample" records. We assume that these sample records are 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.

²The attorney for AIAQ explains that QIC was its predecessor in interest and is now a limited partner of AIAQ.

Initially, we address your assertion that trademark materials are excepted from required disclosure under section 552.101 of the Government Code. You state that the "mention of trademarked information on one of the attachments as indicated by the TM symbol should be excepted on the basis that it is confidential by law under U.S. Patent and Trademark laws." A trademark is defined as "any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C.A. § 1127. Thus, a trademark pertains to the public use of information by a business enterprise to distinguish its goods or services from those of its competitors. The mere fact that information contains a trademark does not make the information confidential. Furthermore, you do not specify any particular provision of the "U.S. Patent and Trademark laws," nor are we aware of any provision, that makes the information confidential. Accordingly, the trademarked information is not protected from disclosure under section 552.101. *See generally* Open Records Decision Nos. 478 (1987), 465 (1987) (stating that statute must explicitly require confidentiality; confidentiality will not be inferred).

You also assert that some of the submitted information is protected by federal copyright law. 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, however, must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to 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). Since neither the university nor AIAQ has established that this information is excepted from disclosure, the university must allow inspection of these documents.

You contend that portions of the information in Exhibits C, D, and E are excepted under section 552.110 of the Government Code. AIAQ also claims that information in Exhibit E is excepted under section 552.110 of the Government Code. Additionally, AIAQ claims that the contract between the university and AIAQ prohibits each party from disclosing the other's information. Information that is subject to the Public Information Act, however, may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Furthermore, 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 from disclosure.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial 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.

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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

AIAQ explains that it is in the business of sampling indoor environments to detect microbial contaminants. AIAQ contracts with the university to analyze the samples. AIAQ asserts that its compilation of sample results is commercial information and release would cause substantial competitive injury. Although AIAQ states that information from samples for a specific project are disclosed to a few persons, AIAQ explains that the entire body of data is closely guarded and only available to key management personnel. Further, AIAQ explains that the body of data has tremendous value because it allows AIAQ to run statistical and empirical analyses and then use the results to plan, predict, and compare with results of its current sampling projects. AIAQ also states that it has spent millions of dollars to create and maintain the body of data. Based on these representations, we conclude that AIAQ has demonstrated, based on specific factual evidence, that releasing the results of sample testing would cause it substantial competitive harm. We have marked the information in Exhibit E that must be withheld under section 552.110 of the Government Code.

However, neither AIAQ nor the university has demonstrated that the remaining information in Exhibits C, D, and E is protected from disclosure by section 552.110 of the Government Code. We also note that some of this information was created by companies other than AIAQ. We have not received arguments from the other companies establishing that this information is protected by section 552.110. *See* Gov’t Code § 552.305(d)(2)(B) (stating that business entity has ten business days in which to submit to this office its arguments, if any, as to why requested information is protected from disclosure under section 552.110). Consequently, the remaining information in Exhibits C, D, and E may not be withheld under section 552.110 of the Government Code.

The university also asserts that portions of Exhibits C and E are excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). You have not asserted, however, that the university is involved in a competitive bidding situation. You make only a general allegation that release of the marked information would give an unfair advantage to competitors or other bidders. Consequently, you have failed to demonstrate the applicability of section 552.104 of the Government Code.

You also contend that information in Exhibits D, E, and F is excepted under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

Exhibits D and F contain some communications between a university attorney and university employees. You represent that these communications consist of legal advice and opinions rendered for the university as the client. Having reviewed these communications, we agree that most of the highlighted information reveals the client's communications or the attorney's legal opinion or advice. Therefore, you may withhold the marked information in Exhibits D and F under section 552.107(1).

We note, however, that the remaining information you seek to protect under the attorney-client privilege does not involve the university as an attorney or a client, but rather involves a university professor as an expert witness. Section 552.107(1) protects information that an attorney of a governmental body is prohibited from disclosing. Most of the documents in Exhibits D and E are communications from a private attorney to his client, QIC. We have no indication that these communications involve a university attorney or the university as a client. Furthermore, you do not indicate that any attorney for the university has a duty under the common interest doctrine to maintain the confidentiality of these records. *See, e.g., Strong v. State*, 773 S.W. 2d 543 at 552 (Tex. Crim. App. 1989). Thus, section 552.107(1) is not applicable to most of the submitted information.

We also note that AIAQ contends that communications from consulting experts are excepted from disclosure pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure. This office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted by a governmental body. See Open Records Decision No. 416 (1984). Recently, however, the Texas Supreme Court ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, No. 00-0453, 2001 WL 123933 at *14 (Tex. Feb. 15, 2001). Since the submitted communications do not fall into one of the categories of information made expressly public by section 552.022 of the Government Code, we conclude that the Texas Rules of Civil Procedure are not applicable to the submitted communications.

Further, you claim that portions of Exhibits C, E, and F are excepted under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). But see Open Records Decision No. 631 (1995) (finding personnel matters of a broader scope were excepted from disclosure under section 552.111). Finally, section 552.111 does not apply unless the agencies between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

After reviewing the submitted information, we conclude that some of the highlighted information in Exhibit F contains advice, recommendations, opinions, and other material reflecting the policymaking processes of the university and may, therefore, be withheld. However, the communications between the university and AIAQ do not reveal a privity of interest or common deliberative process regarding a policy matter. Thus, we conclude that these communications cannot be withheld under section 552.111 of the Government Code. Additionally, some of the highlighted information contains purely factual information that may not be withheld under section 552.111. We have marked the information in Exhibit F that is excepted from disclosure under section 552.111.

In conclusion, you must withhold the marked information in Exhibit E under section 552.110 of the Government Code. You may withhold the marked information in Exhibits D and F under section 552.107(1) of the Government Code. You may also withhold the marked information in Exhibit F under section 552.111 of the Government Code. You must release the remaining submitted information and allow the requestor access to copyrighted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

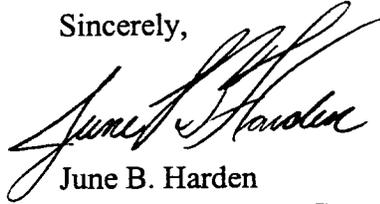
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 151092

Enc: Marked documents

c: Ms. Linda Burgess
Winstead, Sechrest & Minick, P. C.
100 Congress Avenue, Suite 800
Austin, Texas 78701
(w/o enclosures)

Mr. Kenneth A. Hill
Quilling, Selander, Cumiskey & Lownds, P. C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(w/o enclosures)