April 23, 2002

Mr. Joe A. De Los Santos
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2002-2078

Dear Mr. De Los Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161607.

The Southwest Independent School District (the "district"), which you represent, received a request for information regarding the district's Medicaid billing history through its School Health and Related Services Programs ("SHARS") and its Medicaid Administrative Claim Program, and information concerning the district's agreements with Medicaid billing consultants. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You also state that you notified the Texas Association of School Boards ("TASB") and Deloitte & Touche, L.L.P. ("Deloitte"), third parties whose proprietary interests have been implicated by the request, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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). We have considered the exception you claim and the argument submitted by Deloitte, and reviewed the submitted representative sample of information.[1] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

[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.

Initially, we note that Exhibits 1 and 2 contain information that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3) (emphasis added). The information in Exhibit 1 consists of several executed contracts relating to the receipt or expenditure of public funds, and the information in Exhibit 2 consists of excerpts from a completed report. Therefore, as prescribed by section 552.022, such information must be released unless it is confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the district may not withhold the information in Exhibits 1 and 2 under section 552.103 of the Government Code. As there is no other exception claimed with respect to the information in Exhibit 2, such information must be released to the requestor.

Next, we will address whether Exhibit 1 contains third party proprietary information that must nevertheless be withheld from disclosure. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, TASB has not submitted to this office its reasons explaining why its information should not be released. Therefore, we have no basis to conclude that the submitted information relating to TASB is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party 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 Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the submitted information relating to TASB may not be withheld from disclosure under section 552.110.

On the other hand, Deloitte has submitted arguments for withholding its fee structure, an enumeration of specific services provided under Deloitte's comprehensive approach to "Revenue Enhancement," and other contractual terms relating to Deloitte's commercial relationship with school district clients, under sections 552.101, 552.104, and 552.110 of the Government Code.[2]

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. After reviewing the submitted materials and arguments, we do not believe that the requested information must be withheld based on a right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy); Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy). Common-law privacy protects the rights of individuals, not corporations. Open Records Decision No. 620 (1993). Corporations do not have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)); *see* Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings, and does not protect evaluation report on private college). Thus, the companies have no right of privacy in their financial information. We are not aware of, nor has Deloitte referred us to, any statute outside the Public Information Act (the "Act") that would make the requested information confidential. Moreover, we note that commercial and financial information and trade secret information is protected under section 552.110 of the Government Code, which Deloitte has raised. Therefore, we conclude that the requested information is not excepted from disclosure under section 552.101.

Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause 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). The purpose of section 552.104 is to protect the purchasing interests of governmental bodies in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* As the district does not raise section 552.104, this

---

[2]We note that Deloitte has submitted additional information that it claims is excepted from disclosure. However, as the district did not submit this information for our review, this ruling does not address whether such information is subject to disclosure under the Public Information Act.

section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Thus, the district may not withhold information pertaining to Deloitte under section 552.104.

Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 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); 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 subject to the Act 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, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. 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).

Based on Deloitte's arguments and our review of the submitted information, we conclude that Deloitte has not demonstrated that any portion of information in Exhibit 1 that relates to Deloitte is excepted from disclosure under section 552.110(a). Further, we conclude that Deloitte has not established the applicability of either section 552.110(a) or 552.110(b) to the general contractual terms in its contract with the district. *See* Open Records Decision Nos. 541 at 8 (1990) (general terms of contract with state agency are usually not excepted from disclosure), 514 (1988) (Attorney General reluctant to find that entire contract with governmental body is protected by section 552.110.), 494 at 6 (1988); *see also* Gov't Code § 552.022(3); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 514 (1988) (public has an interest in knowing prices charged by government contractors), 184 (1978). We find, however, that Deloitte has demonstrated that release of its fee structure and information regarding its specific services would cause it substantial competitive harm. Therefore, the district must withhold the information we have marked in Exhibit 1 under section 552.110(b) of the Government Code. The remaining information in Exhibit 1 must be released.

We will now address the applicability of section 552.103 to the information in Exhibit 3. Section 552.103 of the Government Code provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that, prior to the district's receipt of the present request, the district was named as a defendant in the case of *United States of America ex rel. Ramesh Gudur v. Texas Department of Health et al.*, Civil Action No. H-00-1169, which involves allegations that the district fraudulently billed Medicaid. The requestor indicates that the judge in this case dismissed the school district from this lawsuit on February 12, 2002. However, the district was a party to this lawsuit on February 6, 2002, the date it received the present request for information. Therefore, we find that the district has shown that it was a party to pending litigation on the date it received the present request and, thus, it has met the first prong of the section 552.103 test. *See* Gov't Code § 552.103(c). Furthermore, we conclude that the information in Exhibit 3 relates to the pending litigation.

We note, however, that the requestor contends that the district previously released a portion of the requested information to a federal agency, thereby violating the confidentiality of the information and waiving exceptions to it public release. Specifically, the requestor argues that the information relating to Medicaid billing consultants' contracts for the year 2000 may not be withheld from disclosure because the United States General Accounting Office (the

"GAO") has previously reviewed such information. The requestor also contends that the United States Office of the Inspector General (the "IG") is reviewing School-Based Health Services throughout the school districts in Texas and that, in order to do so, the IG must necessarily review the fee arrangements between consultants and school districts. The requestor argues that release of the requested information to the GAO and/or the IG constitutes a release to the public and that the district may not now choose to withhold the same information from the requestor.

Generally, a governmental body, such as the district, may transfer information to another governmental body subject to the Act without violating the confidentiality of the information or waiving exceptions to disclosure. *See* Attorney General Opinions H-917 at 1 (1976), H-242 at 4 (1974); Open Records Decision No. 661 at 3 (1991). In Open Records Decision No. 650 (1996), however, this office found that the policy supporting the interagency exchange of information is absent when a federal agency requests information that is not required by law to be disclosed as the governmental body cannot effectively insure that the federal agency will maintain the confidentiality of the information because the federal agency is subject to an open records law that differs from the Act. *See* Attorney General Opinion H-242 at 4 (1974); *see also* Attorney General Opinion MW-565 at 4 (1982); Open Records Decision No. 561 at 6 (1990).

It remains unclear to this office, however, whether any of the information that is actually responsive to the present request has been released to the IG or the GAO. Further, it is unclear whether any such release of the requested information would have been required by law. If the district previously released the submitted information to a federal agency and such release was not required by law, then the submitted information may not be withheld from the requestor under section 552.103. *See* Gov't Code § 552.007; *see also* Attorney General Opinion JM-400 (1983); Open Records Decision No. 650 (1996) (once a disclosure to the public has occurred the information in question must be made available to any person). If the district did not release the submitted information to a federal agency where such release was not required by law, we determine that the district may withhold the information in Exhibit 3 under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize: (1) we have marked the information in Exhibit 1 that must be withheld under section 552.110(b); (2) if the district did not previously release the submitted information to a federal agency where such release was not required by law, the district may withhold the

information in Exhibit 3 under section 552.103; and (3) the remaining information must be released.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

Karen A. Eckerle

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 161607

Enc: Submitted documents

c: Ms. Marlene M. Martin
Financial Center Northwest
6243 IH10 West, Suite 840
San Antonio, Texas 78201
(w/o enclosures)

Mr. Robert C. Blume
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(w/o enclosures)

Ms. Kandis Ream
Medicaid Reimbursement Manager
Texas Association of School Boards
P.O. Box 400
Austin, Texas 78767-0400
(w/o enclosures)