



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 28, 2003

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M University System
John B. Connally Building, 6th Floor
301 Tarrow
College Station, Texas 77840-7896

OR2003-1299

Dear Mr: Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177182.

Texas A&M University - Corpus Christi (the "university") received a request for "the top three proposals for EAP services, with the exception of [the requestor's] proposal," as well as a list of all bidders, the prices submitted, and evaluation criteria scores. The university takes no position as to whether the requested information is excepted from public disclosure. You believe, however, that this request for information may implicate the proprietary interests of two private parties to which the requested information pertains. You notified those parties, Deer Oaks EAP Services ("Deer Oaks") and Interface EAP ("Interface"), of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ You also submitted the requested information. We received correspondence from Interface. We have considered the submitted arguments and have reviewed the submitted information.

We first note that a private party has ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code chapter 552 in certain circumstances).

why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). This office has received no arguments from Deer Oaks. Thus, Deer Oaks has not demonstrated that any of the requested information constitutes proprietary information for purposes of section 552.110 of the Government Code. See Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Interface has submitted arguments in which it raises sections 552.101, 552.104, 552.110, and 552.114 of the Government Code. Interface also points out that portions of its proposal were marked "confidential." We note, however, that information is not confidential under chapter 552 of the Government Code simply because the party submitting the information anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of chapter 552. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to chapter 552] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information relating to Interface comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Interface also contends that portions of its proposal constitute private information. Section 552.101 of the Government Code encompasses the common-law right to privacy.² Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Prior decisions of this office also have determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.,* Open Records Decision Nos. 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

We note, however, that common-law privacy protects the rights of individuals, not those of business organizations such as Interface. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). We therefore conclude that none of the information for which Interface claims an exception to disclosure is protected by common-law privacy under section 552.101 of the Government Code.

Interface also asserts that information contained in its proposal comes within the scope of the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). *See* 45 C.F.R. § 160.101 *et seq.* However, Interface does not specify any HIPAA provision that prohibits disclosure of the information in question, nor are we aware of such a HIPAA provision. Therefore, we conclude that the university may not withhold any of the information contained in Interface’s proposal under section 552.101 of the Government Code in conjunction with HIPAA.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” This exception protects the interests of governmental bodies, not the proprietary interests of private parties such as Interface. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As the university has not raised section 552.104, none of the requested information may be withheld under this exception.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) 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. See Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, 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 also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Interface has not established that any information contained in its proposal qualifies as a trade secret under section 552.110(a). Likewise, Interface has not made the required factual or evidentiary showing that the release of any of the information in its proposal would likely cause Interface substantial competitive injury. Consequently, none of the information in Interface's proposal is excepted from disclosure under section 552.110.

Section 552.114 excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. *See* Open Records Decision No. 634 at 5 (1995). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). FERPA is incorporated into chapter 552 of the Government Code by section 552.026, which provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Interface has not demonstrated, and it does not otherwise appear to this office, that any information contained in Interface's proposal must be withheld from disclosure under section 552.114 of the Government Code or FERPA.

We note, however, that section 552.137 of the Government Code is applicable to some of the submitted information. This exception provides as follows:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked private e-mail addresses in the proposals of Deer Oaks and Interface that are confidential under section 552.137. The university does not inform us that the individuals to whom these e-mail addresses belong have affirmatively consented to their public disclosure. Therefore, the university must withhold the marked e-mail addresses under section 552.137. We note that section 552.137 is not applicable to an e-mail address that a governmental body provides to a public official or employee.

The Deer Oaks proposal also contains a social security number that may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the university to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution the university, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the university should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, we note that some of the submitted information is protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). However, an officer for public information must comply with the copyright law and is not required to furnish copies of information that is copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she 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 at 8-9 (1990).

In summary, the social security number in the Deer Oaks proposal may be excepted from disclosure under section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The university must withhold the marked e-mail addresses under section 552.137. The university must release the rest of the submitted information, complying with copyright law in doing so.

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).

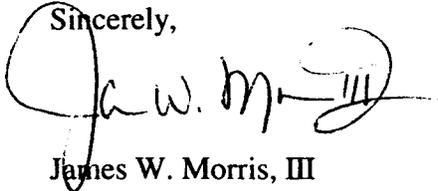
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a distinct "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 177182

Enc: Submitted documents

c: Mr. Rick Dielman
Workers Assistance Program, Inc.
2525 Wallingwood Drive, Bldg. 5
Austin, Texas 78746
(w/o enclosures)

Ms. Melinda Down, Ph.D.
Deer Oaks EAP Services
7272 Wurzbach Road, Suite 601
San Antonio, Texas 78240
(w/o enclosures)

Ms. Tina Pace
Interface EAP
7670 Woodway, Suite 350
Houston, Texas 77063
(w/o enclosures)