



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

March 5, 2003

Mr. Patrick L. Flanigan  
District Attorney, 36<sup>th</sup> Judicial District of Texas  
P.O. Box 1393  
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OR2003-1410

Dear Mr. Flanigan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 177457.

The Aransas County Clerk (the "clerk"), which you represent, received a request for "digitized copies of documents filed in the Real Property Records of Aransas County during the period from 1990 to the present date." On behalf of Rockport Abstract & Title Company ("Rockport"), the clerk asserts that most of the requested information, in the format requested, is excepted from disclosure under section 552.110 of the Government Code. As to that information, in a letter to the clerk, an attorney for Rockport contends that the clerk would breach an agreement with Rockport if she were to honor the request.<sup>1</sup> The requestor has submitted comments stating his belief that the requested information should be released under the Act. *See* Gov't Code § 552.304. We have considered the claimed exception and all of the submitted comments and arguments.

We note at the outset that, although you were required to do so by section 552.301(e) of the Government Code, you submitted neither the requested information nor a representative

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<sup>1</sup>Pursuant to section 552.305 of the Government Code, you notified Rockport of the request, inviting it to submit arguments to this office. *See* Gov't Code § 552.305. As of the date of this decision, this office received no arguments from Rockport in response to that notice. *See id.* § 552.305(c)(2)(B) (providing ten business days to submit arguments to this office in response to section 552.305 notice). The submitted information, however, includes arguments made by the clerk on behalf of Rockport as well as arguments made by an attorney for Rockport to the clerk. This decision addresses the submitted arguments.

sample of that information to this office for review. *See* Gov't Code § 552.301(e)(1)(D). Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason may exist to withhold information when the information is confidential by another source of law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness under predecessor to section 552.302 overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because the submitted arguments pertain to claims by a third party, we shall address these arguments.

We first address the section 552.110 assertion. The clerk contends that this exception applies to the information in the format in which it has been requested. Section 552.110 of the Government Code states:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
- (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 is excepted from [required public disclosure].

Gov't Code § 552.110. Section 552.110(a) protects from public disclosure information that is subject to trade secret protection. This office has held that if a governmental body takes no position on a trade secret claim under section 552.110, we must accept a private person's claim for exception as valid if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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 single or ephemeral events 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 determining whether a *prima facie* case of trade secret has been shown for particular information, this office considers the above definition, as well as the Restatement's list of six trade secret factors:

(1) the extent to which the information is known outside of [the company]; (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 [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). In this instance, none of the submitted comments or arguments explain how release of any of the digital information at issue here implicates the above definition of a trade secret. Similarly, none of the submitted comments or arguments address any of the above six trade secret factors. We are advised that the digital information at issue here consists of copies of the clerk's real property records, saved in TIFF format. The information from which the digital copies were obtained is a matter of public record and is not excepted from required public disclosure by any of the Act's exceptions. *See* Local Gov't Code § 191.006. The TIFF format into which the digital information at issue is copied is not proprietary to Rockport, but rather was designed for the specific purpose of information sharing.<sup>2</sup> We thus find that there has been no *prima facie* demonstration of trade secret protection. Accordingly, we further conclude that none of the information at issue is excepted from required disclosure by section 552.110(a).

In regard to section 552.110(b), the plain language of this branch of section 552.110 provides that a governmental body or third party raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that the information at

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<sup>2</sup>TIFF stands for "Tagged Image File Format" and is defined as "[a] bitmap graphics file format that was developed by Aldus and Microsoft for storing scanned images [which] transfers well between different platforms." *See techdictionary.com*, at <http://www.techdictionary.com/index.html>.

issue constitutes “commercial or financial information” and that substantial competitive injury would likely result from its disclosure. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). This office has held that the words “commercial or financial information” as used in section 552.110(b) refer to information that relates to the financial or commercial condition of the person or entity that provided the information to the governmental body. Open Records Decision No. 550 at 5 (1990). Here, we have no indication that any of the digital information at issue constitutes such “commercial or financial information.” Neither the clerk nor Rockport has explained how the public release of any of the digital information at issue would reveal anything about the financial or commercial condition of Rockport. Further, there has been no showing that release of this information would result in substantial competitive harm to Rockport. We thus conclude that none of the information at issue is excepted from required disclosure by section 552.110(b).

We will next address whether the clerk is prohibited by contract from releasing the requested information. As noted, we are informed that the information at issue here<sup>3</sup> consists of digitized copies of certain of the clerk’s real property records saved on twenty-nine compact disks. The submitted documents indicate that Rockport created these digitized copies by converting information on microfiche, and provided these copies to the clerk for a fee. According to a written agreement between Rockport and the clerk, the clerk purchased from Rockport a license pertaining to the clerk’s use and reproduction of this digital information. This agreement states that the information was furnished to the clerk “for the exclusive use of” the clerk and that “the right to reproduce [the information] in bulk for sale or license to any other party is reserved” by Rockport. Rockport contends that the clerk would breach this agreement if she were to comply with the present request.

In pertinent part, section 552.228 of the Government Code states:

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

(1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;

(2) the governmental body is not required to purchase any software or hardware to accommodate the request; and

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<sup>3</sup>The clerk indicates that the information at issue in this decision pertains to the time period from 1990 until the end of 1997. We are advised that the clerk also holds responsive digital information “from January 1998 forward” and that the clerk will provide copies of that information to the requestor.

(3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

Gov't Code § 552.228(b). Here, the digital information at issue exists in an electronic medium and the requestor has requested copies in that medium. Further, the first two of the three conditions listed above are apparently met. The clerk and Rockport, however, appear to argue that in light of their above-described agreement, the third condition is not met. We next address this argument.

Section 552.228(b)(3) refers to a *copyright* agreement. The Federal copyright statute, 17 U.S.C. §§ 101 *et. seq.*, grants exclusively to a copyright owner a specified “bundle of rights” in copyrighted works: the rights of reproduction, adaptation, publication, performance, and display. *See id.* § 106. The enforcement of these five enumerated rights is governed exclusively by the statute. *Id.* § 301. Thus, the sole remedy under current law *for an alleged copyright infringement* is a cause of action under the federal copyright statute. *See, e.g., Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, (4<sup>th</sup> Cir. 1993) (federal copyright statute preempted state cause of action to the extent state statute purported to grant equivalent of federal copyright statute’s exclusive right of reproduction). We thus conclude that section 552.228(b)(3) requires only that the governmental body’s contemplated manner of providing the requested information would not violate the federal copyright statute.

An essential element of copyright protection is originality. The federal copyright statute provides that copyright protection is available for “*original* works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (emphasis added). The U.S. Supreme Court has explained this requirement of originality:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. . . . Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, *not the result of copying*.

*Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) (emphasis added, citations omitted). The representations made to this office clearly indicate that the digital information at issue here consists entirely of *copies* of public records. Other than the difference in the method of storage of the information, the digital information on the compact

disks is apparently the same as the information on the source microfiche.<sup>4</sup> The latter information comprises public records that are not subject to copyright protection. The requested information is a copy of these public records. The creation of the requested information involved only copying, and thus did not require “at least some minimal degree of creativity.” Because no one has argued and nothing in the file shows that any of the information on the compact disks constitutes “original works of authorship,” we conclude that the digital information at issue here is not able to be copyrighted. Accordingly, notwithstanding the agreement between the clerk and Rockport, we have no basis to conclude that, by providing copies of the information at issue to the requestor, the clerk would commit copyright infringement or otherwise violate the federal copyright statute.

We next find that, to the extent the clerk’s contract with Rockport could otherwise be interpreted under state contract law as prohibiting the clerk from releasing information responsive to the records request at issue, this contract is unenforceable. A governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

In this instance, because the conditions of section 552.228(b)(1)–(3) of the Government Code are met, the Act mandates that the clerk “shall provide a copy” of the information at issue to the requestor “in the requested medium.” Accordingly, notwithstanding any agreement specifying otherwise, we conclude that, as no exceptions to disclosure have been shown to be applicable, the clerk must release copies of the requested information to the requestor in the requested format.

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

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<sup>4</sup>The Act provides that the media on which public information is recorded includes “film” as well as “a magnetic, optical, or solid state device that can store an electronic signal.” Gov’t Code § 552.002(b)(2), (3). Thus, for purposes of the Act, the difference between the storage medium for information on microfiche versus information on compact disk is of no consequence.

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,



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Open Records Division

MAP/jh

Ref: ID# 177457

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