ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2005

Ms. Barbara E. Roberts
Chamberlain, Hrdlicka, White, Williams, & Martin
1200 Smith Street, Suite 1400
Houston, Texas 77002

OR2005-06799

Dear Ms. Roberts:

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# 229169.

The Katy Independent School District (the "district"), which you represent, received a request for 43 categories of information related to an interlocal contract between Houston Independent School District and the district for health benefits services provided by Mercer Human Resource Consulting and Mercer Human Resource Consulting of Texas, Inc. ("Mercer"). You state that the district does not have information responsive to some of the requested categories of information.[1] You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.110 of the Government Code. You further represent that the district notified Mercer of the request for information and of Mercer's right to submit comments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Mercer, in its response to the notice, asserts that the submitted information is excepted under sections 552.101, 552.102, 552.103, 552.104, and 552.110 of the Government Code. We have considered the claimed exceptions

[1] We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

and reviewed the submitted representative samples of information.[2] We have also considered arguments submitted by the requestor. *See* Gov't Code § 552.304 (allowing interested third party to submit comments indicating why requested information should or should not be released). This ruling only addresses the information submitted by the district responsive to the instant request for information. *See* Gov't Code § 552.301(e)(1)(D).

You inform us, and provide documentation showing, that the district asked the requestor to clarify categories 26, 29, 38, and 41 of this request for information. We note that a governmental body may communicate with a requestor for the purpose of clarifying or narrowing a request for information. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 2-5 (1999). You indicate that the district has not received a response to its request for clarification. Accordingly, we find that the district has no obligation at this time to release any information that may be responsive to categories 26, 29, 38, and 41 of the requested categories of information. Please note, however, that if the district receives a response to its request for clarification and wishes to withhold any information to which the requestor seeks access, the district must request another decision. *See* Gov't Code §§ 552.301, 552.302.

We next note that some of the submitted information is subject to section 552.022, which provides in relevant part the following:

> (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:
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> . . .
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> (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). The submitted contracts and account information are subject to section 552.022. Section 552.103 is a discretionary exception under the Act, and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989)

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[2] We assume that the "representative samples" of records submitted to this office 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.

(discretionary exceptions in general). Accordingly, the district may not withhold any of the documents that are subject to section 552.022 under section 552.103.

The district asserts that the remaining information at issue is excepted under section 552.103 of the Government Code. Section 552.103 provides in relevant part:

> (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.
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> . . .
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> (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.

Gov't Code § 552.103(a), (c). 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. *Univ. of Tex. Law Sch. v. Tex. 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 section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[3] Open

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[3] In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You and Mercer indicate that the requestor, as representative of one of Mercer's competitors, is currently engaged in litigation with Mercer and may commence other related litigation. Thus, Mercer asserts that release of the submitted information would affects its litigation interests. However, section 552.103 protects the litigation interests of governmental bodies, not private parties. *See* Open Records Decision Nos. 575 at 2 (1990), 551 at 3 (1990). You also assert that a dispute between the district and Mercer may result in litigation. However, after review of your arguments, we find the district has not established that it reasonably anticipates litigation. Accordingly, the district may not withhold any of the information at issue under section 552.103.

The district asserts that some of the submitted information is 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). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). You inform us that the information at issue relates to a contract that has been finalized, therefore, section 552.104 does not apply in this instance. We note Mercer also asserts its submitted information is excepted under section 552.104; however, this section protects the interests of governmental bodies, not private parties. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government).

The district and Mercer additionally argue that documents pertaining to Mercer are excepted from disclosure because the district agreed to maintain the confidentiality of this information. We note, however, that a governmental body may not withhold information that is subject to the Act on the basis of a contractual provision that prohibits disclosure of the information, unless the governmental body has specific statutory authority to make such a contract. *See* Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). Neither Mercer nor the district informs us that the district has such statutory authority. Furthermore, information may not be withheld from the public under the Act merely because the person who provided the information to the governmental body anticipated or requested confidentiality in doing so. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668,

676-78 (Tex. 1976); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Thus, the submitted information may not be withheld from disclosure on the basis of an agreement to do so or because Mercer expected or requested confidentiality in providing information to the district.

Mercer claims section 552.101 of the Government applies to the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by statute. Mercer claims the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). None of the submitted information may be withheld under HIPAA.

Mercer also asserts that some of the submitted information is private medical information of district employees that is excepted under sections 552.101 and 552.102 of the Government Code. Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable

person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). None of the submitted information includes private medical information as Mercer claims. Therefore, none of the submitted information is confidential under the section 552.101 in conjunction with the doctrine of common-law privacy.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Indus. Found.*, 540 S.W.2d at 683-85. None of the submitted information includes personnel file information. Accordingly, the district may not withhold any of the submitted information under section 552.102.

Mercer also asserts that some of the submitted information is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade

secret factors.[4] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch 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). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[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." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* 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).

Having considered Mercer's arguments and reviewed the information at issue, we find that Mercer has not shown that any of the submitted information meets the definition of a trade secret. Thus, the department may not withhold any of the information at issue pursuant to section 552.110(a). However, upon review of Mercer's arguments and the submitted information, we find that Mercer has established that the submitted request for proposal analysis, which we have marked, is excepted from disclosure under section 552.110(b). However, we find that Mercer has made only conclusory allegations that release of the other information it seeks to withhold under section 552.110(b) would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, only the marked analysis may be withheld pursuant to section 552.110(b). *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

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[4] The following are the six factors that the Restatement gives 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 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).

Finally, we note that some of the materials at issue may be protected by copyright. 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 must allow inspection of copyrighted materials unless an exception 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).

In summary, the district must withhold the marked analysis under section 552.110(b) of the Government Code. The district must release the remaining information at issue; however, in releasing information that is protected by copyright, the district must comply with copyright law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

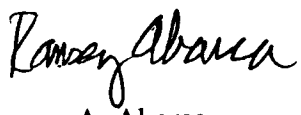
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Tex. 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,



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Ref: ID#229169

Enc. Submitted documents

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