ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2005

Mr. Felipe Zavala
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5809 Acacia Circle
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OR2005-09859

Dear Mr. Zavala:

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# 235218.

The Housing Authority of the City of El Paso (the "authority"), which you represent, received a request for a proposal submitted to the authority by the Center for Employee Assistance (the "center"). You take no position with respect to the public availability of the responsive information. You believe, however, that the information that you have submitted may implicate the proprietary interests of the center. You notified the center of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released.[1] We also received correspondence in which an attorney for the center claims exceptions to disclosure under sections 552.101, 552.104, and 552.110 of the Government Code.[2] We have considered the Center's arguments and have reviewed the submitted information.

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

[2]We note that the center also raises sections 552.022, 552.113, and 552.131 of the Government Code. Section 552.022 is not an exception to public disclosure under the Act; rather, this section lists 18 categories of information that must be released to the public unless the information is expressly confidential under other law or, in the case of section 552.022(a)(1), excepted from disclosure under section 552.108. *See* Gov't Code § 552.022(a)(1)-(18). Section 552.022 is not applicable in this instance. Although sections 552.113 and 552.131 are exceptions to disclosure, the center has submitted no arguments in support of these sections, and therefore we do not address section 552.113 or section 552.131. *See id.* § 552.301(e)(1)(A).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The center appears to raise section 552.101 in conjunction with the common law right to privacy. Common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976). The center contends that information relating to its employees is private under section 552.101.[3] The center also asserts that certain information relating to business practices and other matters is confidential. We note that common law privacy protects the rights of individuals, not those of business entities such as the center. *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). Having considered the center's arguments and reviewed the submitted information, we conclude that none of the information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy.

The center also raises section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). Section 552.104 protects the interests of governmental bodies, not the proprietary interests of private parties such as the center. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Furthermore, section 552.104 is a discretionary exception to disclosure that a governmental body may waive. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver). In this instance, the authority has not claimed an exception to disclosure under section 552.104. Therefore, the authority may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, we address the center's claim under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties with respect to 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

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[3]In claiming that the release of information relating to its employees would constitute an unwarranted invasion of the employee's personal privacy, the center also appears to rely on section 552.102(a) of the Government Code. We note, however, that section 552.102(a) is applicable only to the personnel information of public officials and employees. Furthermore, the privacy analysis under section 552.102(a) is the same as the test under section 552.101 and common law privacy under *Industrial Foundation*. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(a)-(b).

The center asserts that the submitted information contains trade secrets that are protected by section 552.110(a). 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). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.[4] *See* Open Records Decision No. 552 at 5 (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. *See* Open Records Decision No. 402 (1983).

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[4]The 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).

Having considered the center's arguments under section 552.110(a), we find that the center has not established that any of the submitted information qualifies as a trade secret under section 552.110(a). We therefore conclude that none of the submitted information is excepted from disclosure under section 552.110 of the Government Code.

Lastly, we note that the center seeks to have e-mail addresses withheld from disclosure. Section 552.137 is applicable to certain e-mail addresses and provides in part:

> (a) Except as otherwise provided by this section, 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.
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> (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.
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> (c) Subsection (a) does not apply to an e-mail address:
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> > (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
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> > (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
> >
> > (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
> >
> > (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

Gov't Code § 552.137(a)-(c). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

In this instance, the only e-mail address contained in the submitted information is the center's own institutional e-mail address. The authority may not withhold the center's e-mail address under section 552.137.

In summary, none of the submitted information is excepted from disclosure under section 552.101, section 552.104, section 552.110, or section 552.137 of the Government Code. Accordingly, all of the submitted 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).

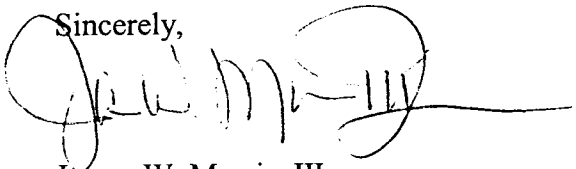
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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,



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JWM/sdk

Ref: ID# 235218

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