



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2008

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County Texas
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-03632

Dear Ms. Lytle:

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# 305162.

El Paso County the ("county") received a request for several categories of information pertaining to tissue recovery services. You state that you have released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. While you also raise sections 552.101 and 552.110 of the Government Code as possible exceptions to disclosure, you make no arguments as to whether some of the submitted information is excepted under these sections. Instead, you state, and provide documentation showing, that you notified the interested third parties, South Texas Blood & Tissue Center ("South Texas"), Musculoskeletal Transplant Foundation ("MTF"), American Donor Service, Inc. ("American"), and Bio-Tissue, Inc. ("Bio-Tissue"), of the county's receipt of the request and of each party's right to submit arguments to this office explaining why the requested information should not be released. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received arguments from South Texas. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

You assert that the information contained in Attachments G ,H, I, and J is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in 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.

...

(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.

Id. § 552.103(a), (c). A governmental body 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 on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that the county is a party to a lawsuit that was filed prior to the receipt of the instant request and is currently pending in district court. You inform us that the information contained in Attachments G ,H, I, and J relates to the pending litigation. Having considered your arguments and reviewed the information at issue, we find that you have demonstrated that the county was involved in pending litigation on the date of its receipt of this request for information. We also agree that the information at issue is related to the litigation. Therefore, the county may generally withhold the information contained in Attachments G, H, I, and J under section 552.103 of the Government Code.¹

We note, however, that the opposing party in the pending litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the pending litigation has seen or had access to the information at issue, any such information is not protected by section 552.103 and may not be withheld on that basis. With the exception of such information, the county may withhold the remaining information at issue under section 552.103 of the Government Code. However, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We now turn to the remaining information at issue, which you assert may be subject to third party claims. We note that an interested third party is allowed 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 why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from MTF, American, or Bio-Tissue explaining how the release of the submitted information would affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of MTF, American, or Bio-Tissue, and the county may not withhold any portion of the submitted information on that basis. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

South Texas asserts that portions of its information are excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Section 552.101 of the Government Code 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 that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). South Texas has not directed our attention to any law under which any of its submitted information is considered to be confidential for purposes of section 552.101. Therefore, the county may not withhold any of the submitted information pertaining to South Texas under section 552.101 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from

exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 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), 522 (1989) (discretionary exceptions in general). As the county did not submit any arguments in support of withholding any information pursuant to section 552.104, the county may not withhold any of South Texas' information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Section 552.110 of the Government Code 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* ORD 232. 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. ORD 552. 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. *Id.* § 552.110(b); *see* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing South Texas’ arguments and the information at issue, we conclude that South Texas has established a *prima facie* case that a portion of the submitted information constitutes trade secrets. Therefore, the county must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, South Texas has failed to demonstrate that its remaining information constitutes a trade secret and thus the remaining information may not be withheld under section 552.110(a) of the Government Code. We also conclude that South Texas has demonstrated that a portion of the information at issue is excepted under section 552.110(b). Thus, the county must withhold the information we have marked under section 552.110(b) of the Government Code. However, we determine that South Texas has not established by specific factual evidence that any of the remaining information is excepted from disclosure as commercial or financial information the release of which would cause the company substantial competitive harm

under section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110(b), business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Thus, no portion of South Texas' remaining information may be withheld under section 552.110 of the Government Code.

We note that a portion of the of submitted information is subject to section 552.136 of the Government Code.² Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Upon review, we find that the county must withhold the information we have marked under section 552.136 of the Government Code.

Finally, we note that a portion of the submitted information is 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 protected by copyright. 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 materials protected by copyright, 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 county may the information contained in Attachments G, H, I, and J under section 552.103 of the Government Code. The county must withhold the information we have marked under section 552.110 and section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 305162

Enc. Submitted documents

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