



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2009

Mr. Ian Halperin
Director of Public Information
Mesquite Independent School District
405 East Davis Street
Mesquite, Texas 75149

OR2009-07748

Dear Mr. Halperin:

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# 345173 (MISDORR2009.17).

The Mesquite Independent School District (the "district") received a request for (1) pre-screening interview questions for principals, teachers, special education teachers, and substitutes and (2) interview screening questions that the district provides to principals for use in interviewing teachers. You state that the district is not in possession of any information that is responsive to the first part of the request.¹ You claim that the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also believe that the submitted information implicates the proprietary interests of Gallup, Inc. ("Gallup"). You notified Gallup 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.² We received correspondence from Gallup. We have considered all of the submitted arguments and reviewed the submitted information.

¹We note that the Act does not require the district to release information that did not exist when it received this request, create responsive information, or obtain information that is not held by the district or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

²*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).

Initially, we address your statement that the submitted information is subject to confidentiality and ownership and proprietary rights clauses in the district's contract with Gallup. You contend that release of the submitted information to the requestor would be a breach of the contract. Likewise, Gallup contends that the submitted information is subject to "strict contractual controls." We note that all information held by a governmental body is subject to disclosure under the Act unless it falls within one of the Act's specific exceptions to disclosure. See Gov't Code §§ 552.002, .006, .021; Open Records Decision No. 565 at 9-10 (1990). We also note that information is not confidential under the Act simply because the party that submitted the information anticipated or requested that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] 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 Gov't Code § 552.110). Thus, the district must release the submitted information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary. See Open Records Decision No. 470 at 2 (1987).

Both the district and Gallup claim that section 552.110 of the Government Code is applicable to the submitted information. Section 552.110 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 competitive harm to the person from whom the information was obtained." 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 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 [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a 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.³ *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 at issue 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) 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. *See* Open Records Decision No. 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

The district generally contends that section 552.110 is applicable in this instance.⁴ Gallup argues that the interview questions contained in Exhibits B and C constitute Gallup's trade secrets. Gallup also asserts that release of these interview questions would cause Gallup substantial competitive harm. Having considered Gallup's arguments and reviewed the

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).

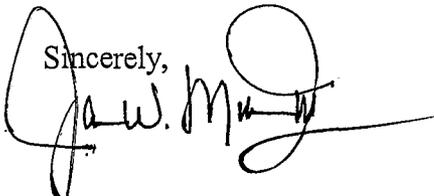
⁴We note that the purpose of section 552.110 is to protect the proprietary interests of a private party that provides information to a governmental body rather than the interests of the governmental body itself. *See* Open Records Decision No. 592 (1991) (comparing statutory predecessors to Gov't Code §§ 552.104 and 552.110).

information at issue, we find that the interview questions constitute trade secrets under section 552.110(a). We therefore conclude that the district must withhold all of the interview questions in Exhibits B and C under section 552.110 of the Government Code. As we are able to make this determination, we need not address the other submitted arguments against disclosure.⁵

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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

JWM/cc

Ref: ID# 345173

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Ms. Lisa B. Kiichler
Gallup, Inc.
1001 Gallup Drive
Omaha, Nebraska 68102
(w/o enclosures)

⁵Because the requestor only seeks access to the submitted interview questions, the remaining information in Exhibits B and C is not responsive to this request. Accordingly, this decision does not address the public availability of the remaining information, and the district need not release that information in response to this request.