



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 30, 2009

Ms. Stephanie S. Rosenberg
General Counsel
Humble Independent School District
P.O. Box 2000
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OR2009-15478

Dear Ms. Rosenberg:

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# 359911.

The Humble Independent School District (the "district") received a request for 1) information related to bids for advertising on school buses, 2) e-mails between three named individuals and Steep Creek Media ("Steep Creek"), 3) e-mails between a named district official and Clean Fuel, and 4) documents related to contracts and payments to Clean Fuel during a specified time period. We note that you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You state that the district has released some of the responsive information to the requestor. You also state that the district does not have any

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

information responsive to item number 4 of the request.² You claim that the submitted information responsive to item number 3 is not subject to the Act. In the alternative, you also claim that the submitted information is excepted from disclosure under sections 552.101, 552.109, 552.110, 552.136, and 552.137 of the Government Code. In addition, you state that release of some of the submitted information may implicate the proprietary interests of Steep Creek Media ("Steep Creek"). Accordingly, you have notified Steep Creek of the request and of its opportunity to submit arguments to this office as to why its information should be excepted from public disclosure. *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). We have received comments from Steep Creek. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to this request as it consists of e-mail communications that are not between the named parties. As such, this information is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). You inform us that Exhibit C consists of personal e-mails that have no connection with district business and represent use of a personal e-mail address by a district trustee. After reviewing the information at issue, we agree that the information in Exhibit C does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district. *See id.* § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information is not subject to the Act and the district need not release it in response to this request.³

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *disim'd*); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, we understand Steep Creek to assert that some of the submitted information is confidential because it is marked as confidential. We note, however, information is not made confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under the Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, the submitted information may not be withheld unless it falls within an exception to disclosure.

Next, both the district and Steep Creek assert that some of the submitted information is excepted under section 552.110 of the Government Code. Section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district's arguments under section 552.110. However, we will address Steep Creeks's arguments under section 552.110 of the Government Code.

Section 552.110 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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 also* 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).

Steep Creeks argues that its information is excepted under section 552.110 of the Government Code. Upon review, we find Steep Creek has not demonstrated that any of its information constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, the district may not withhold any of the information at issue under section 552.110(a) of the Government Code. However, we determine Steep Creek has established that the release of its client information would cause the company substantial competitive harm. Therefore, the district must withhold the information we have marked under section 552.110(b) of the Government Code. We note, however, Steep Creek has failed to demonstrate that release of the remaining information it seeks to withhold would cause it substantial competitive harm. *See* Gov’t Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Next, the district and Steep Creek both assert that some of the remaining information is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory,

⁴The 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).

or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrines of constitutional privacy and common-law privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See ORD 455 (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision No. 545 (1990). We note that an individual’s home address and telephone number are generally not private information under common-law privacy. See Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person’s home address and telephone number is not an invasion of privacy), 455 at 7 (home addresses and telephone numbers do not qualify as “intimate aspects of human affairs”).

Upon review, we find that portions of the submitted information are highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, no portion of the remaining information is either highly intimate or embarrassing and of no legitimate public interest. Accordingly, no portion of the remaining information may be withheld under section 552.101 on this basis. Further, we find the district has failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Thus, none of the remaining information may be withheld under section 552.101 on that basis. Therefore, the district may only withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note subsection 552.137(c)(1) states that subsection 552.137(a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" *Id.* § 552.137(c)(1). In addition, the e-mail addresses you have marked in Exhibit F were provided to the district by vendors who sought to contract with the district, and are, thus, specifically excluded by section 552.137(c)(2). *Id.* § 552.137(c)(2). As such, these e-mail addresses may not be withheld under section 552.137 of the Government Code. You do not inform us that a member of the public has affirmatively consented to the release of the remaining marked e-mail addresses. Therefore, unless the district receives consent to release, the district must withhold the remaining e-mail addresses you have marked, and the additional e-mail address we have marked, under section 552.137.

We note that some of the remaining information is subject to section and 552.117 of the Government Code.⁵ Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.⁶ Gov't Code § 552.117(a)(2). Accordingly, the district must withhold the information we have marked pursuant to section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The submitted information contains, in part, personal information pertaining to a deceased employee. Because the protection afforded by section 552.117 includes "current or former" officials or employees, the protection does not lapse at death, except with regard to the deceased's social security number. We note, however, the protection afforded by section 552.117 does not extend to

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

⁶"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

information relating to a deceased family member. Cf. Attorney General Opinions JM-229, H-917 (1976) ("We are ... of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981). Accordingly, the district must withhold the information we have marked under section 552.117(a)(1), to the extent the employees timely elected under section 552.024 to keep such information confidential.

In summary, the information in Exhibit C is not subject to the Act. The district must withhold the Steep Creek's client information, which we have marked under section 552.110(b) of the Government Code. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. With the exception of the e-mails in Exhibit F, the district must withhold the marked e-mail addresses under section 552.137 of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the employees timely elected under section 552.024 to keep such information confidential. The district must also withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. The remaining information must be released.⁷

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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

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⁷We note the remaining information contains social security numbers that the district may withhold pursuant to section 552.147(b) of the Government Code. See Gov't Code § 552.147(b) (governmental body may redact social security number without necessity of requesting decision from this office under the Act).

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Enc. Submitted documents

c: Requestor
(w/o enclosures)

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