



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2011

Mr. Chad M. Elkins
Elkins Law Office
For Iraan General Hospital District
P.O. Box 4028
San Angelo, Texas 76902

OR2011-07476

Dear Mr. Elkins:

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# 418731.

The Iraan General Hospital District (the "district") received a request for information presented to the district's board pertaining to the market analysis, construction cost numbers, and absorption and proposed unit rates for the viability of assisted living in the district, including a specified presentation. You claim the requested information is not subject to the Act. In the alternative, you claim the requested information is excepted under sections 552.104 and 552.110 of the Government Code. Additionally, you state that the requested information may implicate the interests of Parrish, Moody & Fikes, P.C. ("PMF"). Accordingly, you state and provide supporting documentation demonstrating, you notified PMF of the request for information and of its right to submit arguments stating why its information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments.

Initially, we note that you have not submitted information responsive to the request. Although you assert the district itself does not maintain information responsive to the request, you state the district had a verbal agreement with PMF to have the study at issue completed. We note that the Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) 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.

Gov't Code § 552.002(a). Thus, the Act encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. *Id.* § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Where a third party has prepared information on behalf of a governmental body and the governmental body has a right of access to it, the information is subject to the Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990). Based on your representation that the district had an agreement with PMF to conduct the study at issue, we find the information at issue is related to the transaction of official district business. Accordingly, to the extent the requested information is maintained for the district, and the district has a right of access to it, such information falls within the scope of section 552.002(a) and is subject to the Act. To the extent that this information is not collected, assembled, or maintained for the district or the district does not own or have a right of access to such information, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor.

To the extent the district has access to information responsive the request, we will address its public availability. Section 552.301(e) of the Government Code requires submission to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the written request was received, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). As of the date of this letter, you have not submitted to this office a copy or representative sample of the requested information. Consequently, we find district failed to comply with the requirements of section 552.301 with respect to this information.

Pursuant to section 552.302 of the Government Code, failure to submit to this office the information required in section 552.301(e) results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released, unless a compelling reason to withhold the information is demonstrated to overcome this presumption. See *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302 of the Government Code); see also Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information may be demonstrated by showing the information is made confidential by another source of law or third party interests are affected. See ORD 630. You raise section 552.104 and claim there are third-party interests at stake. We note section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See Gov't Code § 552.007; see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). In failing to comply with section 552.301, the district has waived its claim under section 552.104 and, therefore, may not withhold any information it has a right of access to under this exception. Although the district also raises section 552.110, which can provide compelling reasons for non-disclosure, because you have not submitted the requested information for our review, we have no basis for finding any of the information subject to this exception.¹ Furthermore, we have not received comments from PMF explaining how release of the requested information would affect its proprietary interests. See Gov't Code § 552.110; 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). Therefore, to the extent it has a right of access, the district must release the requested information pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

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

¹In addition, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body.

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,

A handwritten signature in black ink, appearing to read 'Tamara Wilcox', written in a cursive style.

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 418731

No submitted documents

c: Requestor

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