



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 23, 1994

Mr. T.A. Pounders
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City of Dallas
Office of the City Attorney
City Hall
Dallas, Texas 75201

OR94-128

Dear Mr. Pounders:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ We assigned your request ID# 18515.

The North Central Texas Regional Certification Agency (the "agency"), which you represent, has received a request for 71 certain certification applications. Specifically, the requestor seeks:

Any and all documents in your files concerning the [71] enterprises This includes, but is not limited to applications for D/M/WBE status, certification affidavits, names, addresses and phone numbers of persons or principals applying, correspondence to and from those enterprises or persons, internal reviews or file notations.²

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²In addition, the requestor seeks "requests for the same or similar information filed with your agency; the names of the persons that have filed the requests; and the current status of those requests." Because you do not comment on this information, we presume that it has been or will be made available to the requestor to the extent that it exists. *See* Open Records Decision No. 363 (1983).

You have submitted representative samples of the requested information to us for review. You claim that sections 552.101 and 552.110 of the Government Code except the requested information from required public disclosure.

Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. We have received numerous responses. Collectively, the respondents claim that sections 552.101, 552.102, 552.104, and 552.110 except the requested information from required public disclosure.³ Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Collectively, the respondents claim that the information submitted to us for review constitutes "trade secrets" and "commercial or financial information." We first address the "trade secrets" branch of section 552.110.

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, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. 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, . . . [but] 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. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one

³Section 552.104 is designed to protect only a governmental body's interests. *See* Open Records Decision No. 541 (1990) at 4-5. Thus, the respondents have no standing to assert section 552.104.

submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.⁴

You advise us as follows:

The NCTRCA certifies businesses as Minority/Women/Disadvantaged Business Enterprises ("M/W/DBE's") for twelve member local governments in the Dallas/Ft. Worth Metropolitan area. Businesses seek certification in order to participate in federal and local contracting programs. In order to be certified, an applicant must submit an application form, plus adequate additional documentation to establish that the business is owned and controlled by members of an acceptable classification (usually by race or sex). Standard documentation provided to the NCTRCA includes financial statements, income tax forms, third party agreements (loans, leases, joint operating agreements, etc.), minutes of board of directors meetings and bank records (monthly statements, signature cards, etc.).

We have examined the arguments submitted to us for review. We conclude that none of the respondents has made a *prima facie* case that the requested information constitutes

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

(1) the extent to which the information is known outside of [the company]; (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 [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, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

trade secrets.⁵ Accordingly, we conclude that the requested information may not be withheld from required public disclosure under the trade secrets branch of section 552.110 of the act.⁶

Next, we address the "commercial or financial information" branch of section 552.110. "Commercial or financial information" may be withheld from required public disclosure under section 552.110 if it is privileged or confidential by statute or judicial decision. Some of the respondents argue that release of the requested information implicates the common-law privacy interests of the company's sole proprietor.⁷ Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* is of no legitimate concern to the public. In contrast, the constitutional right of privacy protects information relating to marriage, procreation, contraception, family relationships, and child rearing and education. See Open Records Decision No. 447 (1986) at 4.

⁵Some of the respondents claim that the requested information is excepted from required public disclosure under the "commercial or financial information" branch of section 552.110 on the basis of the reasoning in Open Records Decision No. 494 (1983). These respondents assert that the requested information is excepted because its release would either 1) impair the agency's ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. Past open records decisions issued by this office have relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 552.110 to commercial information. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991), reliance on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions exempting commercial and financial information pursuant to federal interpretations of exemption 4 were overruled. Unless the information requested constitutes trade secrets or is "privileged or confidential" under the common or statutory law of Texas, it cannot be withheld under section 552.110.

⁶Internal operating or business information, as well as technological processes or ideas, may constitute a trade secret. See R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* §§ 14.06, 14.09; "What is a 'trade secret' so as to render actionable under state law its use or disclosure by former employee," 59 A.L.R.4th 641; see, e.g., *Gonzales v. Samora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi 1990, no writ) (evidence supported status of business procedures and forms as trade secrets). We have not found, nor have you referred us to any judicial decision protecting a business' income statement, balance sheet, creditor information or general history as a trade secret.

⁷Some of the requestors assert common-law privacy in conjunction with section 552.102 of the act, which excepts "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test the Texas Supreme Court articulated for section 552.101. See *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, our discussion of common-law privacy under section 552.101 resolves the application of section 552.102 as well.

In Open Records Decision No. 373 (1983) (copy enclosed), this office concluded:

In our opinion, all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Generally, transactions involving loans to individuals made or guaranteed by governmental bodies are matters of legitimate public interest, and thus are ordinarily not within the protection of common-law or constitutional privacy. Open Records Decision No. 590 (1991) at 3; *see also* Open Records Decision Nos. 525 (1989); 480 (1987); 385 (1983). Open Records Decision No. 373 noted, however, that in certain instances there may not be an adequate demonstration of legitimate public interest to justify the invasion of the applicant's privacy. Open Records Decision No. 373. Accordingly, the availability of "personal financial information" should be addressed on a case-by-case basis. *See also* Open Records Decision Nos. 600 (1992); 545 (1990) (excepting information relating to an employee's participation in a deferred compensation plan).

In the instant case, applicants for certification status are required to submit, *inter alia*, historical balance sheets, income statements and cash flows. Where the business seeking certification is a sole proprietorship, the required information necessarily reflects the financial history of the owner of the business. Prior opinions issued by this office clearly establish that such information constitutes "the basic facts regarding a particular financial transaction between the individual and the governmental body" and as such is of legitimate interest to the public. *See* Open Records Decision No. 523 (1989). Accordingly, the requested information may not be withheld from required public disclosure under section 552.101 of the act in conjunction with common-law privacy.

Finally, we note that some of the requested information must be withheld from required public disclosure under section 552.101 in conjunction with federal law. Title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms); 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the requested information must be withheld from required public disclosure under section 552.101 of the act to the extent

that it contains tax return information made confidential by federal statute. Except for tax return information, however, the requested information must be released in its entirety.⁸

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/GCK/rho

Ref.: ID# 18515

Enclosures: Open Records Decision No. 373
Submitted documents

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⁸The requested information includes birth certificates. Release of birth records is governed by section 552.115 of the act, which provides that birth records may be made available to the public "on and after the 50th anniversary of the date on which the record is filed with the Bureau of Vital Statistics or local registration official." Until this time limit has passed, a birth certificate may be obtained from the Bureau of Vital Statistics only in accordance with chapter 192 of the Health and Safety Code. *See generally* Open Records Decision No. 596 (1991).

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