



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

November 21, 1995

Ms. Judith M. Porras
General Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR95-1263

Dear Ms. Porras:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 32351.

The General Services Commission (the "commission") received a request for the following information regarding Sweezy Construction Company ("Sweezy"):

1. Bid List/Certification Application
2. Birth Certificate of Pauline Sweezy
3. Any Tax Forms filed with application
4. Articles of Incorporation
5. Minutes
6. Corporate By-Laws
7. Stock Certificates
8. Stock Transfer Ledger
9. Proof of Stock Purchase
10. Third-Party Agreements

11. Lease/Rental Agreement for business site
12. Copy of Bank Signature Card
13. Canceled Checks
14. Purchase Invoices
15. Business Loan Agreement
16. Texas Franchise Tax Public Information Report
17. Texas Sales and Use Tax Permit
18. Employee's Quarterly Report
19. Applicable License and/or Permits

The commission claims that it is willing to release items 1, 4, 6, 7, 16, and 17. However, it claims that the remainder of the information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, this office informed Sweezy of the request and of its obligation to claim the exceptions to disclosure it believes apply to the requested information, together with its arguments as to why it believes the claimed exceptions apply. Sweezy replied, claiming that sections 552.101, 552.102, 552.104, and 552.110 of the Government Code except the requested information from disclosure. We have considered the exceptions the commission and Sweezy have claimed and have reviewed the documents at issue.

The commission states that it does not have some of the requested information, the stock transfer ledger, the proof of stock purchase, third-party agreements, employee's quarterly report, and applicable license and/or permits. We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). Therefore, the commission need not respond to these requests.

Section 552.110 is divided into two parts: (1) trade secrets, and (2) commercial or financial information. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). 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 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 submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

Here, Sweezy has not established a prima facie case that any of the requested information is a trade secret. It has done nothing more than assert the exception. Therefore, the commission may not withhold any of the requested information under the first part of section 552.110.

To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. We previously notified you that we were reconsidering Open Records Decision No. 592 (1991) in RQ-739. In Open Records Letter No. 95-1214 (1995), we have declined to overrule that decision. A copy of Open Records Letter No. 95-1214 (1995) is enclosed for your information. Therefore, we will now address your contention that the second part of section 552.110 excepts the requested information from disclosure.

Item 3, Sweezy's federal tax return, is confidential under federal law. 26 U.S.C. § 6103(a). Therefore, the commission must withhold item 3. As neither the commission nor Sweezy has demonstrated that a statute or judicial decision excepts the remainder of the requested information from disclosure, we conclude that this information is not excepted by the second part of section 552.110 of the Government Code.

¹The 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 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, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. See Open Records Decision No. 592 (1991) at 8. The commission did not claim that section 552.104 excepts the requested information from disclosure. Additionally, there does not appear to be any particular competitive bidding situation to which this requested information would relate. Therefore, the commission may not withhold the requested information under section 552.104.

Both the commission and Sweezy contend that item 2, Ms. Sweezy's birth certificate, is protected from disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 552.101 also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

We do not find anything highly intimate or embarrassing or anything falling within the zones of privacy in the birth certificate. Therefore, the commission may not withhold item 2 from disclosure.²

Sweezy has also claimed that release of items 1, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, and 17 would violate Sweezy's privacy rights. However, the right of privacy protects the feelings of human beings, not businesses. Open Records Decision No. 192 (1978) at 4. Therefore, generally, businesses have no common-law or constitutional privacy rights. Consequently, the commission may not withhold any of the requested information under a right of privacy.³

Both the commission and Sweezy claim that article 9.01-9.03 and article 1302-5.03-5.04 of Vernon's Texas Civil Statutes except items 3, 5, 11, 12, 13, 14, and 15 from disclosure. Sweezy further claims that these statutes also except items 1, 4, 6, 7, 16, and 17 from disclosure. We disagree. We presume that "article 9.01-9.03" was intended to refer to articles 9.01-9.03 of the Business Corporation Act. These statutes make confidential responses made by a corporation to interrogatories propounded by the Secretary of State to learn whether the corporation has complied with the requirements of the Business Corporation Act. Clearly, there are no such interrogatories here and these statutes do not except the requested information from disclosure. Article 1302-5.03 gives the Attorney General authority to conduct an investigation into the organization, conduct, and management of any corporation and to examine the corporation's books, records, and other documents. V.T.C.S. art. 1302-5.03. Article 1302-5.04 states that the Attorney General shall not make public information derived from an examination provided for in article 1302-5.03. *Id.* art. 1302-5.04. There is no investigation to which this request for information relates; this is a request under the Open Records Act. Therefore, article 1302-5.03-5.04 do not except the requested information from disclosure.

²We note that section 552.115 of the Government Code provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health is excepted from required public disclosure "except that a birth record is public information and 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." As section 552.115 applies only to birth certificates maintained by the bureau of vital statistics, the commission may not withhold this birth certificate pursuant to that provision. *See* Open Records Decision No. 338 (1982).

³Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Therefore, we need not address Sweezy's 552.102 argument separate from its argument under section 552.101. We further note that section 552.102(a) applies to personnel files of government employees which do not appear to be at issue here.

Therefore, in summary, the commission must withhold Sweezy's federal income tax information. The commission may not withhold the remainder of the requested information. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
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Open Records Division

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Ref.: ID# 32351

Enclosures: Open Records Letter No. 95-1214 (1995)
Submitted documents

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