



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 14, 1997

Mr. Frank J. Garza  
First Assistant City Attorney  
City of San Antonio  
P. O. Box 839966  
San Antonio, Texas 78283-3966

OR97-0060

Dear Mr. Garza:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102853.

The City of San Antonio (the "city") received a request for the following categories of information:

1. All audit reports and investigative reports--including any letter or memo that describes the results of an investigation, analysis, or inquiry--produced by the city's internal audit section from Oct. 1, 1991, to present.
2. The just completed compliance audit of the Paragon Cable contract, including the auditors' notes and working papers. All other such audits, including auditor notes and working papers since January of 1991.
3. All letters, notes or memos from 1991 to the present, referencing Paragon, written by any Paragon employee or agent; any city employee, agent, or elected official; and any city resident.

You have submitted a representative sample of the requested records and contend that portions of this information are excepted from required public disclosure under sections 552.101, 552.102,<sup>1</sup> 552.107, 552.110 and 552.116. However, you assert that the city "will release to the requestor all other portions of the requested information that [you] believe

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<sup>1</sup>Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together for the submitted records.

is open to the public.” We have considered the exceptions you claim and have reviewed the submitted exhibits.

You assert that the information submitted in response to the first two categories of the request are audit reports, which are excepted from disclosure under section 552.116 of the Government Code. Section 552.116 of the Government Code excepts from disclosure “[a]n audit working paper of the *state auditor*.” You contend that “the City’s internal auditor is a state auditor since the City is a political subdivision of the state.” However, there is no indication in the submitted audit records that the state auditor has identified the records at issue as audit working papers. Furthermore, this exception by implication makes audit working papers other than those of the State Auditor public, unless covered by some other exception. See Open Records Decision No. 211 (1978). Therefore, we conclude that section 552.116 does not protect the city’s records submitted in response to the first two categories of requested information.

We next consider the submitted exhibits in response to category three of the request. We first address your assertion that section 552.101 of the Government Code excepts Exhibits IV, “Paragon Cable customer complaints,”<sup>2</sup> and X, “Internal Survey.” Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses both common-law and constitutional privacy. Under common-law privacy, private facts about an individual are excepted from disclosure. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation*. Information must 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. Although the city claims that the submitted information is excepted from disclosure under section 552.101, we do not find any information that is protected by privacy<sup>3</sup> in Exhibits IV and X. Furthermore, the city has not indicated and we are not aware of, any statute that would make the submitted information confidential in the possession of the city.

Next we consider whether section 552.107 of the Government Code protects any of the records submitted as Exhibit VIII. Section 552.107(1) excepts information from disclosure if:

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<sup>2</sup>We note that the submitted sample of customer complaints, which includes the city’s and Paragon Cable’s responses to those complaints, was submitted by the city and not Paragon Cable. Therefore, in this ruling we do not address the applicability of the Cable Act to “personally identifiable information concerning any [Paragon Cable] subscriber.” 47 U.S.C. § 551(c)(1).

<sup>3</sup>The scope of constitutional privacy is narrower than that under the common-law doctrine of privacy; therefore, constitutional privacy also does not protect this information from disclosure. See *Ramie v. City of Hedwig Village, Texas*, 765 F.2d. 490 (5th Cir. 1985).

[I]t is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. Open Records Decision No. 574 (1990) at 5. However, section 552.107(1) does not protect purely factual information unless the factual information constitutes a confidence that the client related to the attorney. *See id.* We have reviewed the documents submitted as Exhibit VIII and marked the information which is excepted from disclosure by section 552.107(1).

Finally, we address whether section 552.110 protects from required disclosure any of the requested records submitted as Exhibits IV, V, VI, VII, and IX relating to KBL Cablesystems of the Southwest, Inc. d/b/a Paragon Cable ("Paragon Cable"). Pursuant to section 552.305 of the Government Code, we notified Paragon Cable, whose proprietary interests are implicated by the request for information, of its opportunity to claim that information they submitted to the city is excepted from required public disclosure. Paragon Cable responded, arguing that Exhibit V is excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from 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. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the commercial or financial information prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

The city has not demonstrated that releasing Exhibits IV or VII will impair the government's ability to obtain necessary information in the future. *See, e.g., Bangor*

*Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible"); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"). Therefore, the city may not withhold Exhibits IV or VII under the second prong of section 552.110. Additionally, we note that the city does not claim that its own proprietary interests are at issue for Exhibits VI and IX; rather, the city claims section 552.110 on behalf of Paragon Cable. As Paragon Cable did not argue section 552.110 for Exhibit VI and IX, the city may not withhold these exhibits under section 552.110.

We next consider Paragon Cable's claim that Exhibit V is a trade secret. 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.), 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 . . . . 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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>4</sup> This office has held that if a

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<sup>4</sup>The 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.

governmental body takes no position with regard to the application of the trade secret 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. Although, in its brief to this office, Paragon Cable has addressed each of the six trade secret factors, we conclude that the information in Exhibit V, the "Paragon Cable Upgrade Fiber Upgrade and Maps," is not the type of information protected by the trade secret prong of section 552.110. Accordingly, the information in Exhibit V is not excepted from required public disclosure and must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.<sup>5</sup> 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

  
Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/cbh

Ref.: ID# 102853

Enclosure: Submitted documents

cc: Mr. Ken Dilanian  
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(w/o enclosures)

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306 RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, (1982) at 2, 255 (1980) at 2.

<sup>5</sup>In conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.