



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 10, 1997

Ms. Susan Septimus  
Assistant General Counsel  
University of Houston System  
1600 Smith, Suite 3400  
Houston, Texas 77002

OR97-2023

Dear Ms. Septimus:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 108355.

The University of Houston (the "university") received a request on June 13, 1997, for the "mathematical formula used to determine the pay grade levels for staff position and all factors and information used to go into the calculation." The requestor also sought "a copy of the software program used to calculate the pay grade levels, and any documentation regarding the purpose, function, and use of this program." We note that the requestor first sought the formula information on May 28, 1997. You did not request a decision from this office until June 17, 1997. The Open Records Act generally imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is generally presumed to be public. *See* Gov't Code § 552.302. In this case, however, it appears that you attempted to clarify the request for information even though the original request specifically asked for "all mathematical formulas and calculations used to determine pay grade levels, listings and explanations of any and all relevant factors or variables used in performing the calculations, the numerical weighting of each relevant factor or variable, and details of how the calculation and weightings [sic] were determined; plus listings and explanations of any and all additional factors, whether objective or subjective, that are used to determine university staff pay grade levels." Gov't Code §552.222.

We also note that section 552.301(b) of the Government Code requires a governmental body to submit to this office (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, and (3) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the

documents. You have not, however, submitted to this office copies or representative samples of the specific information that was requested. Thus, pursuant to section 552.303(c) of the Government Code, this office notified you by facsimile dated July 9, 1997, that you had failed to submit the information required by section 552.301(b). We requested that you provide this information to our office within seven days from the date of receiving the notice. The notice further stated that under section 552.303(e) failure to comply would result in the legal presumption that the information at issue was presumed public. The fact that submitting copies for review to the Attorney General may be burdensome does not relieve a governmental body of the responsibility of doing so. Open Records Decision No. 497 (1988).

As of the date of this letter you still have not provided our office with the information that was requested. Therefore, as provided by section 552.303(e), the information that is the subject of this request for information is presumed to be public information. You explain, however, that the requested information may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. Thus, because the rights of a third party, Watson Wyatt & Company ("Watson Wyatt"), may be implicated by release of the requested information, we will consider the arguments against disclosure. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified Watson Wyatt about the request. *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 that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Watson Wyatt responded to our notice by arguing that the formula and software information is not subject to the Open Records Act, and that if it is, the information is protected from disclosure by section 552.110 of the Government Code. The university joins in the same arguments on behalf of Watson Wyatt. This office has received correspondence dated July 8, 1997, wherein the requestor states that he no longer wishes to have the software information; rather, he now merely seeks the calculation or formula used by university. Thus, this ruling does not address any arguments against release of the software information originally requested. The university need not release the software and software information.

As a threshold issue, both the university and Watson Wyatt argue that the pay-scale formula is not subject to the Open Records Act under the reasoning set forth in Open Records Decision No. 581 (1990). In Open Records Decision No. 581 (1990), this office determined that certain computer-related information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of

information made public under section 552.021 of the Government Code. It appears that the formula at issue was created with criteria, factors, and objectives selected by the university. It is also our understanding that the formula is the pay scale with which the university determines employees' salaries. The formula determines how public employees are paid and how the university allocates its public funds. This office has stated on many occasions that there is a legitimate public interest in the expenditure of public funds. *See* Gov't Code 552.022(3); Open Records Decision Nos. 541 (1990) at 1-2, 520 (1989) at 5, 518 (1989) at 7, 233 (1980) at 2. Moreover, this office has stated that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision 600 (1992). This includes the salary of a public employee. Open Records Decision No. 455 (1987); *see* Gov't Code § 552.002(2). Thus, we believe that the requested formula and its factors have an independent public significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Open Records Decision No. 581 (1990) at 4. The formula and its factors are subject to disclosure under the Open Records Act.

We will now consider the arguments against disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties 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. Both the university and Watson Wyatt argue that the requested formula and its factors are protected as trade secrets.

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.<sup>1</sup>

After reviewing the trade secret arguments, we do not believe that the university or Watson Wyatt has demonstrated that the pay-scale formula is a trade secret under section 552.110 of the Government Code. In light of the significant public interest stated above, we resist the notion that a formula adopted and established by a governmental body to determine public employee salaries is a trade secret. See Open Records Decision Nos. 541 (1990) (Attorney General reluctant to find that entire contract with governmental body is trade secret information), 514 (1988), 184 (1978); see also Open Records Decision Nos. 319 (1982) at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted by section 552.110), 306 (1982) at 3.

Watson Wyatt additionally argues that the formula is protected from disclosure because of a limited use license term within its "Software License Agreement" with the university. Although it is not clear to this office that the pay-scale formula is encompassed in the term software, we note that information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). The university must, therefore, release the requested pay-scale formula and its criteria or factors to the requestor.

Finally, Watson Wyatt notes that the requested information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

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<sup>1</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 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref: ID# 108355

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