



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 16, 1998

Ms. Helen K. Bright
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR98-0720

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113396.

The University of Texas of the Permian Basin (the "university") received a request for eight categories of information concerning the university's Small Business Administration Development Center (the "center"). You claim that the third category of requested information, the center's client file of Paul Adams ("Mr. Adams"), is excepted from disclosure under sections 552.101, 552.103, and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because the property and privacy rights of a third party may be implicated by the release of some of the requested information, this office notified Mr. Adams of this request and of his opportunity to claim that the information at issue is excepted from disclosure. *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 Nos. 575 (1990), 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). Mr. Adams did not respond to our notice.

Initially, you state that the university will release the requested items in categories 1, 2, 4, 5, 6, and 8 to the extent that they exist. We note that chapter 552 of the Government Code applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 572 (1990), 430 (1985).

Additionally, you indicate that the information requested in category 7 is overbroad, and thus you have asked for more specificity from the requestor. In response to the request

for information at issue here, the university may ask the requestor to clarify the request. Gov't Code § 552.222(b)); *see* Open Records Decision No. 561 (1990) at 8. However, the university must make a good-faith effort to relate the request to information in the university's possession and must help the requestor to clarify his request by advising him of the types of information available.

We now address your assertion that the documents which you have submitted for our review are not subject to chapter 552 of the Government Code. Chapter 552 defines public information as that which is collected, assembled, or maintained under a law, 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. Information is generally subject to chapter 552 when it is held by a governmental body and relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. Open Records Decision No. 635 (1995) (information maintained with public resources and accessible to other public employees subject to chapter 552); *see also* Open Records Decision Nos. 626 (1994) at 2 (in determining that handwritten notes were subject to the Open Records Act, "[i]t is immaterial under the act whether an official who holds records regarding official business has discretion to generate or maintain these records"), 327 (1982) at 2 (notes made by public servants in their official capacities and maintained in governmental body's files were subject to Open Records Act). You explain that the center "provides business management counseling services to qualified individuals via an agreement with the U.S. Small Business Administration" (the "SBA"). You argue that the records at issue are the property of the SBA. However, based upon the information before us, you have not established that these records are "owned by" the SBA. Since you provided this office a copy of the documents at issue, we assume these documents are held by the center as public records subject to chapter 552 of the Government Code.

We now consider the applicability of your claimed exceptions under chapter 552 to the information at issue. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You explain that the client file at issue is the subject of an agreement between the university and the SBA, which specifies confidentiality under SBA regulations. Title 13, part 102 of the Code of Federal Regulations establishes the SBA's policies and procedures concerning the types of records at issue here. Generally, however, the mere fact that a governmental body in Texas holds certain information that is confidential under the federal Freedom of Information Act or the federal Privacy Act will not bring the information within the section 552.101 exception, as those acts govern disclosure only information held by federal agencies. Attorney General Opinion MW-95 (1979) at 2; Open Records Decision No. 124 (1976) at 1.

Moreover, 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. 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 an agreement or contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987).

Section 552.101 of the Government Code 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. Financial information concerning an individual is in some cases protected by a common-law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989) (concluding that credit reports and financial statements of individual veterans participating in Veterans Land Program are protected from disclosure as "background" financial information); *but cf.*, Open Records Decision No. 620 (1993) at 4 (concluding that background financial information regarding corporation is not protected by privacy). After reviewing the submitted material, we do not believe that any of the submitted information is the type of "background" financial information protected by common-law privacy. We therefore conclude that section 552.101 does not except the requested information from required public disclosure.

We now address your claimed exception under section 552.110 of the Government Code. Section 552.110 protects the property and privacy interests of third parties 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. In this instance neither the university nor the third party has demonstrated that the requested information constitutes information protected by section 552.110. Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish a prima facie case that information is trade secret). Therefore, the university may not withhold the information under section 552.110.

Finally, we address your claim for an exception under section 552.103(a). This section, referred to as the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. After reviewing your arguments, we conclude that you have not made the requisite showing that litigation is reasonably anticipated. Accordingly, you may not withhold the requested information pursuant to section 552.103.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,


Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/ glg

Ref.: ID# 113396

Enclosures: Submitted documents

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