



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 27, 1998

Ms. Judy Ponder  
General Counsel  
General Services Commission  
P.O. Box 13047  
Austin, Texas 78711-3047

OR98-1051

Dear Ms. Ponder:

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# 114172.

The General Services Commission (the "commission") received a request for

1. Copies of Most Recent Audited Financial Statement
2. Copies of Last and Most Current Operational Budget
3. Copies of Last 3 Years Tax Return
4. Quarterly Meetings for Last 2 Years
5. Texas Council Rules
6. TIBH By Laws
7. Copies of files records, reports, and any and all other documents related to The State of Texas Use Program Operated in the State of Texas.

You explain that the Texas Industries for the Blind and Handicapped ("TIBH") is the current central nonprofit agency under contract with the Texas Council on Purchasing from People with Disabilities (the "council"). You further explain that the council carries out the state's policy regarding the day-to-day functions of the State Use Program. The council is subject to the Open Records Act. *See* Hum. Res. Code § 122.009(c). The commission is the depository for all records concerning the council's operations. *See* Hum. Res. Code § 122.009(b). Further, the commission is required by statute to provide administrative and other necessary support to the council. *See* Hum. Res. Code § 122.012(a). It appears that the commission has released the information responsive to categories 4 and 5 of the request. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the documents you submitted appear to be for informational purposes only, while others appear to be responsive to the request for information. We are assuming that the following documents are the responsive documents you have submitted for purposes of this ruling: "General Services Commission Invitation for Bids"; "Articles of Incorporation of TIBH" and transmittal cover sheet from the Office of the Secretary of State; "Memorandum of Agreement Between the [committee] and [TIBH]"; and "Texas Committee on Purchases of Projects & Services of Blind & Severely Disabled Persons" (inventory of index records listing boxes 1-13 which appear to contain, among other things, minutes and tapes of open meetings).<sup>1</sup> It is unclear to this office, however, whether boxes 1-13 (the "boxes") themselves, in addition to the submitted inventory sheets, are actually in the possession of either the commission or the council.

We note your statement that "[n]either the [commission] nor the [council] maintain the types of records requested." We assume that you are referring to records which may be responsive to the request for information but which you did not submit to this office for review. We recognize that the Open Records Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988). Section 552.002 of the Government Code, however, defines public information as "information that is collected, assembled, or maintained under a law or 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.*" [Emphasis added.]

Thus, information that is collected, assembled, or maintained by a third party, such as TIBH, may be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has a right of access to the information. See Open Records Decision No. 462 (1987); cf. Open Records Decision No. 499 (1988) (relevant facts in determining whether information held by consultant is subject to Open Records Act are: (1) information collected by consultant must relate to governmental body's official business; (2) consultant must have acted as agent of governmental body in collecting information; and (3) governmental body must have or be entitled to access to information). Where a third party has prepared information on behalf of a governmental body, the information is subject to the Open Records Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990) at 2.

Moreover, section 122.009(a) of the Human Resources Code provides that the "records of the council and of a central nonprofit agency shall, to the extent that the records pertain specifically to state purchases" be available for inspection, and "a document that is available for inspection under this subsection is an open record for purposes of [the Open

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<sup>1</sup>The other submitted documents were copies of chapter 122 of the Human Resources Code and title 40 of the Texas Administrative Code. We assume that this material was submitted to this office for informational purposes only, and therefore this ruling does not address those documents.

Records Act].” As we noted above, the commission is the depository for all records concerning the council’s operations. *See* Hum. Res. Code § 122.009(b). Assuming that the commission has a right of access to the information at issue, it is public information subject to disclosure. Moreover, we do not believe that it is appropriate for the commission to send the requestor to the third party in order to obtain the information. The Open Records Act unequivocally mandates the production of public information by the governmental body. *See* Gov’t Code §§ 552.021, 552.221(a).

However, notwithstanding the commission’s statutory right of access to the requested information, we do not believe in this instance, that any of the requested documents which may be in the actual possession of the third party, TIBH, are subject to disclosure. Section 552.107(2) provides that information is excepted from required public disclosure if “a court order has prohibited disclosure of the information.” This office has interpreted this language as protecting only information that a court has specifically ordered not to be disclosed, *i.e.*, information subject to a protective order. *See, e.g.*, Open Records Decision Nos. 309 (1982), 143 (1976). TIBH has submitted to this office a copy of a protective order entered by a Travis County district court judge governing certain material which is also the subject of this request for information.<sup>2</sup> Upon review of this order, we conclude that the commission cannot require TIBH to submit to anyone, including the commission, the requested documents. Thus, if the boxes are solely in TIBH’s possession, they are protected from disclosure by the order and are not subject to the Open Records Act. On the other hand, if the commission or the council has actual possession of the boxes, they are not affected by the order, and are subject to the Open Records Act.

We now consider whether any of the claimed exceptions apply to the information which is subject to the Open Records Act. Because the property and privacy rights of a third party may be implicated by the release of some of the requested information in the commission’s possession or to which the commission has access, this office notified TIBH of this request and of its 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). TIBH responded to our notice, claiming that the requested information is protected by sections 552.103, 552.104, and 552.110 of the Government Code.<sup>3</sup>

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<sup>2</sup>*See TIBH Industries, Inc. v. Dr. Robert A. Swerdlow, Texas Council on Purchasing From People With Disabilities, Texas General Services Commission, and Tom Treadway*, Cause No. 98-01686 (345th Judicial District Court, Travis County, Texas, filed March 11, 1998).

<sup>3</sup>We note that, as sections 552.103 and 552.104 do not protect the interests of a third party such as TIBH, TIBH lacks standing to raise these exceptions.

The commission claims that section 552.104 excepts the records at issue from disclosure. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 593 (1991) at 2. Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision 541 (1990) at 4. Because you have not demonstrated any potential specific harm to the commission's interest in a competitive bidding situation, you may not withhold the requested information under section 552.104 of the Government Code.

Section 552.110 protects the property and privacy interests of third parties by exempting 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. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. 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, 5 U.S.C. § 552, when applying the second prong of section 552.110. In *National Parks & Conservation Association 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. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "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 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). 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. *Id.*<sup>4</sup> This office has held that if a 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.

In this instance, neither the commission nor TIBH has adequately demonstrated how the release of this information would result in "substantial competitive injury." Nor has TIBH established, by a prima facie case, that the requested information is protected as a trade secret. Therefore, you may not withhold the requested information under section 552.110..

You also assert that the information may be protected by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You have presented no statutory or other legal authority which deems this information confidential by law. This section 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

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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.

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

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. After reviewing the submitted material, we do not believe that any of the information is protected by common-law privacy. Accordingly, the extent that the requested information is subject to the Open Records Act, it must be released to the requestor.

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  
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Open Records Division

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Ref.: ID# 114172

Enclosures: Submitted documents

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