



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 17, 1998

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health & Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR98-2224

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118089.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for five categories of information relating to the property known as the triangle. You contend that the submitted documents, labeled exhibits A through J, are excepted from disclosure under sections 552.101 and 552.110 of the Government Code.¹

Since the property and privacy rights of third parties may be implicated by the release of the submitted documents, this office notified the third parties about the request for information. *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). This office received a response from attorneys who represent Triangle Retail, Ltd. ("Triangle Retail") and the partners of Triangle Retail in their individual capacities. The attorneys for Triangle Retail contend that the submitted documents are excepted from disclosure under sections 552.101 and 552.110 of the Government Code.

¹Although you initially claimed that the submitted documents are also excepted from disclosure under section 552.104 of the Government Code, you subsequently withdrew that claim. Additionally, it does not appear that the department submitted all of the requested documents to this office for review. Therefore, to the extent that additional responsive documents exist, we assume that the department has already made such documents available to the requestor.

Exhibits A through E contain personal financial information. Both the department and the attorneys for Triangle Retail contend that exhibits A through E are excepted from disclosure under section 552.101 of the Government Code in conjunction with the common-law right to privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common-law right to privacy. The common-law right to privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. . . .

Of course, personal financial information does not meet the test for common-law privacy unless it is also of no legitimate interest to the public. In ORD 373, we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis. In this case, we do not believe that the public has a legitimate interest in the detailed personal financial information of the individual partners of Triangle Retail and of the partners' family members. Thus, the department must withhold exhibits A through E from disclosure under section 552.101.

The attorneys for Triangle Retail also contend that exhibits F through J, which contain corporate financial information, are also protected by the common-law right to privacy. We note, however, that a corporation or business entity does not have a common-law right to privacy. *See* Open Records Decision No. 600 (1992). The department characterizes exhibits F through J as "corporate financial documents." Because exhibits F through J contain only corporate financial information, these exhibits are not protected by the common-law right to privacy. Therefore, the department may not withhold these exhibits from disclosure under section 552.101.

Both the department and the attorneys for Triangle Retail claim that exhibits F through J are excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of third 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. 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 at 2 (1990). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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. ORD 552 at 5-6 (1990).

²The 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.

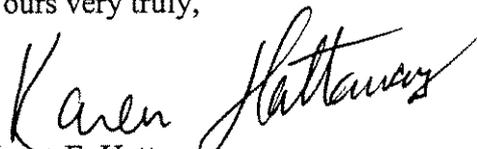
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 when applying the second 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. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. ORD 639 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. *Id.*

Neither the department nor the attorneys for Triangle Retail has presented a prima facie case for the protection of exhibits F through J as trade secrets under section 552.110. Likewise, neither party has demonstrated that Triangle Retail will suffer substantial competitive harm if exhibits F through J are released to the public. Both parties do contend that the release of exhibits F through J will impair the department's ability to obtain such "sensitive financial information" in the future. The department obtained exhibits F through J from Triangle Retail in connection with a bid qualification process. We do not believe that the department's ability to obtain similar information in the future will be impaired by release of these exhibits, because it is unlikely that companies will stop competing for government contracts if certain information involved in those competitions is disclosed. See *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4 (D.D.C. 1981). In other words, the benefits associated with the submission of this particular type of information make it unlikely that the department's ability to obtain future submissions will be impaired. For these reasons, we conclude that exhibits F through J are not excepted from disclosure under section 552.110 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. 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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/mjc

Ref: ID# 118089

Enclosures: Submitted documents

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