



Office of the Attorney General  
State of Texas  
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DAN MORALES  
ATTORNEY GENERAL

Mr. W. Daniel Vaughn  
Attorney at Law  
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Galveston, Texas 77553

OR98-2754

Dear Mr. Vaughn:

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# 119536.

The Park Board of Trustees of the City of Galveston (the "Park Board"), which you represent, received a request to review:

- 1) all contracts for the use of all facilities at Moody Gardens for 1998, 1999, and 2000;
- 2) all correspondence relating to any future use of all facilities at Moody Gardens; and
- 3) the general ledger for fiscal years 1996/1997 and 1997/1998.<sup>1</sup>

You indicate that the Park Board is preparing to release some of the requested documents. However, you contend that many of the requested documents are excepted from disclosure pursuant to sections 552.101, 552.104, 552.110, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed a representative sample of the documents at issue.<sup>2</sup>

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<sup>1</sup>The requestor previously requested the opportunity to review the Park Board's meeting agendas and minutes for 1997 and 1998. Your correspondence with the requestor indicates that the requestor has already been given access to these documents.

<sup>2</sup>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). This open

You offer the following background on the Park Board:

The Park Board is a governmental entity organized and existing in accordance with Texas Local Gov't Code Chapter 306, and qualifies for the added powers and authorities set forth in Texas Local Gov't Code § 306.032. Among other activities under its jurisdiction, the Park Board leases land from the City of Galveston upon which The Moody Gardens Complex has been constructed. The Moody Gardens Complex currently consists of a hotel, conference center, convention center, a botanical garden, a swimming area, and other entertainment facilities. The construction, development, and operation of The Moody Gardens Complex has been accomplished by Moody Gardens, Inc. with grants from The Moody Foundation, with no cost to the Park Board or the City of Galveston. The Moody Gardens Hotel and the conference center at The Moody Gardens Complex are both owned by the Park Board. Moody Gardens, Inc., manages the facilities and underwrites the operating losses under its management agreement with the Park Board. Finally, as part of Moody Gardens, Inc.'s management agreement with the Park Board, the Park Board has a right of access to various documents generated by the Moody Gardens operation.

One of the main purpose [sic] of the Park Board is to attract visitors and tourists to the City of Galveston. The Park Board accomplishes this goal by being awarded various contracts for conventions. The convention contracts are awarded to cities who have submitted the most attractive bid. Thus, the Park Board gathers bids from local hotels and services to assemble its own bid proposal. The Moody Gardens, Inc., as a manager of the Moody Gardens Hotel, likewise, submits bids to the Park Board in competition with other hotels in Galveston. Moody Gardens Hotel does not have access to any other hotel bids submitted to the Park Board. The Park Board then submits its bid proposal for the convention in direct competition with other cities. The bids contain specific information pertaining to hotel rates, local activities, and local services.

Having described the relationship between the Park Board and Moody Gardens, Inc., you contend that the release of the documents at issue would harm the competitive interests of both the Park Board and Moody Gardens, Inc.

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records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We will first examine your arguments relating to the Park Board's competitive interests. The documents at issue include the Park Board's bid proposals for contracts to host annual conventions for the Texas D.A.R.E. Officers Association and the Texas City Management Association. You explain that the Park Board competes against other cities for these contracts. You contend that releasing these bid proposals would harm the Park Board's competitive interests. Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.<sup>3</sup>

You have submitted three of the Park Board's bid proposals, exhibits B, C, and D, to this office for review. Exhibit B is the Park Board's proposal to host the 1998 annual convention of the Texas D.A.R.E. Officers Association. The Park Board is not currently competing for this contract, and you have not demonstrated how release of this bid proposal will harm the Park Board's competitive interests. The Park Board must, therefore, publicly disclose exhibit B.

Exhibit C is the Park Board's bid proposal for the 2001 annual convention of the Texas D.A.R.E. Officers Association. Exhibit D is the Park Board's bid proposal for the 2000 annual convention of the Texas City Management Association. The contracts to host these annual conventions have not been awarded. We believe that publicly disclosing these bid proposals prior to the award of the contracts would harm the Park Board's legitimate marketplace interests. Therefore, we conclude that the Park Board may withhold exhibits C and D from disclosure pursuant to section 552.104.

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<sup>3</sup>You raise both sections 552.104 and 552.110 to protect the Park Board's bid proposals. However, because the specific purpose of section 552.104 is to protect the competitive interests of governmental bodies, we will consider your arguments on behalf of the Park Board under section 552.104. *See* Open Records Decision Nos. 590 (1991), 568 (1990) (attorney general did not apply section 552.110 to information generated and maintained by governmental body but not obtained from third parties).

the requestor. However, the Open Records Act generally prohibits consideration of the motives of the requesting party. Gov't Code § 552.222; Open Records Decision Nos. 542 (1990), 508 (1988). Thus, in determining whether information must be publicly disclosed, we are not influenced by the requestor's motives. The Railroad Museum makes no other arguments against disclosure of its records, and, therefore, we must conclude that the Park Board should publicly disclose information relating to the Railroad Museum.

Moody Gardens, Inc., is the only third party that has offered specific arguments under section 552.110 for withholding its commercial and financial information from disclosure. 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. 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 for commercial and financial information. 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). 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 (1996).

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.* Both you and Moody Gardens, Inc., contend that releasing its proposals to the Park Board and its sales and catering contracts will harm Moody Gardens, Inc.'s ability to compete with other local hotels and service providers. We agree that releasing Moody Gardens, Inc.'s pricing terms from these documents would likely cause Moody Gardens, Inc. to suffer substantial competitive harm. Thus, the Park Board must withhold Moody Gardens, Inc.'s price lists from disclosure under section 552.110. We have marked this information accordingly (see yellow tabs).

In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the court limited the holding in *National Parks* to information that is required to be submitted to the government. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). For information that is voluntarily submitted to the government, the court announced a new test for withholding information from disclosure: the information must be of a kind that the provider would not customarily make available to the public. *Id.*

Moody Gardens, Inc., argues that it voluntarily submits information to the Park Board, and that we should, therefore, consider the release of this information under the *Critical Mass* standard. We disagree. Courts have concluded that information is produced to the government voluntarily when it was not produced pursuant to subpoena or to obtain a contract or other benefit from a governmental body. *McDonnell Douglas Corp. v. United States Equal Employment Opportunity Comm'n*, 922 F. Supp. 235, 241-42 (D. Mo. 1996) (documents produced pursuant to agreement and not to subpoena were produced voluntarily); *Cortez III Serv. Corp. v. National Aeronautics & Space Admin.*, 921 F. Supp. 8, 12-13 (D.D.C. 1996) (general and administrative expense rate ceilings not required to be submitted as part of proposal were submitted voluntarily); *McDonnell Douglas Corp. v. National Aeronautics & Space Admin.*, 895 F. Supp. 316, 318 (D.D.C. 1995) (price elements necessary to win a government contract are not voluntary); *Chemical Waste Management, Inc. v. O'Leary*, Civ. A. No. 94-2230 (NHJ), 1995 WL 115894 (D.D.C. Feb. 28, 1995) (price information submitted in response to a requirement in a request for proposals not voluntarily submitted); *Lykes Bros. Steamship Co. v. Pena*, Civ. A. No. 92-2780-TFH, 1993 WL 786964 (D.D.C. Sept. 2, 1993) (documents provided as a requirement to obtain government approval of application not voluntarily produced). Because Moody Gardens, Inc., submitted the information at issue to the Park Board in order to obtain and/or comply with contracts, we find that Moody Gardens, Inc., did not voluntarily submit this information to the Park Board. Thus, the *Critical Mass* standard is not applicable in this case.

Finally, the submitted documents include samples of documents that contain personal information about Park Board employees and sample medical records. Exhibit H is a form that Park Board employees apparently complete. This form asks for the employee's home address, home telephone number, and the names and ages of each member of the employee's family. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the Park Board may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The Park Board may not withhold information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Exhibit I contains information relating to the Hope Therapy Program. You contend that this information is protected by section 552.101, which excepts from disclosure information made confidential by law. Exhibit I includes sample medical records prepared by physicians. Medical records created by a physician are confidential under the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S. Medical records may only be released only in accordance with the MPA. Open Records Decision No. 598 (1991). *See* V.T.C.S.

art. 4495b, §§ 5.08(c), (j). We have marked the medical records with red tabs. Exhibit I also includes medically related information that is not contained in medical records created by a physician. This information does not fall within the scope of the MPA. We believe, however, that this information is protected by the common-law right to privacy. Information is protected by the common-law right to privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and 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). We have marked the information that meets these criteria (see red tabs). The Park Board must withhold this information from disclosure under section 552.101.

To summarize, the Park Board may withhold exhibits C and D from disclosure under section 552.104. The Park Board must withhold the marked commercial and financial information submitted to it by Moody Gardens, Inc., from disclosure under section 552.110 (see yellow tabs). The Park Board should withhold from disclosure the home addresses and telephone numbers and family member information of those current or former employees who timely requested that their personal information be kept confidential. Certain documents, or portions thereof, are protected by the MPA or the common-law right to privacy, and, therefore, must not be publicly disclosed (see red tabs). All other information must be released.

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/mjc

Ref: ID# 119536

Enclosures: Marked documents

cc: Mr. Steve Greenberg  
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(w/o enclosures)

A copy of OR98-2754 was sent to all third parties.