



February 10, 1999

Ms. Lynn Rodgers
Chief Appraiser
Comal Appraisal District
P.O. Box 311222
New Braunfels, Texas 78131-1222

OR99-0420

Dear Ms. Rodgers:

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# 121722.

The Comal Appraisal District (the "district") received an open records request for

[a] computer printout of all sales and appraisals of Comal County waterfront property for 1996 and 1997, excluding waterfront cove property. Such print-out should include the subdivision, lot number, sales price, and appraised value. [Emphasis in original.]

As we understand your letter to this office, the only information you seek to withhold in response to this request is the information listing the sales price of each respective piece of property. You have asserted various legal theories for withholding the sales information, as has the New Braunfels/Canyon Lake Area Association of Realtors Multiple Listing Service (the "association").

You state that the district obtained the requested sales information from the New Braunfels/Canyon Lake Area Board of Realtors Multiple Listing Service and contend that as an associate member of the board the district is subject to a "confidentiality clause" prohibiting release of the Multiple Listing Service ("MLS") to non-subscribers. Please 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. 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). Consequently, unless the requested information falls within an exception to disclosure, it

must be released, notwithstanding any contract between the district and the board specifying otherwise.

You next contend that the requested information is not subject to disclosure pursuant to section 552.027 of the Government Code because the requestor “may acquire this information from” the board. Section 552.027(a) of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. The legislative history of this provision notes that section 552.027 should exclude from the definition of public information

books and other materials that are also available as research tools elsewhere *to any member of the public*. Thus, although public library books are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added). Therefore, section 552.027 excludes commercially available research material from the definition of “public information.”

In its brief to this office, however, the association explains that only licensed real estate brokers and appraisers are eligible to subscribe to the MLS. Thus, it cannot be said that the MLS is available “to any member of the public.” We therefore conclude that the MLS does not constitute the type of information that section 552.027 was intended to exempt from the provisions of the Open Records Act. Accordingly, the district may not withhold the requested information pursuant to section 552.027.

You also contend that the requested information is excepted from required public disclosure pursuant to section 552.110 of the Government Code, which excepts from required public disclosure two categories of information: 1) trade secrets and 2) commercial or financial information. A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 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 to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 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 No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a

prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

The association responded to this office's invitation to explain why the sales information at issue is excepted from public disclosure pursuant to section 552.110 and has argued in detail that each of the six factors listed above apply. Of course, to be protected under this branch of section 552.110, the information at issue must be "secret." Both you and the association have informed this office that the type of information at issue is routinely released to members of the public. You state that the district has "always released sales information of particular properties under protest or in litigation." Further, the association states that it "poses no objection to [the district's] release of limited and specific sales price information, even when provided by the Association, for narrowly defined requests such as the prices of comparables used in the appraisals of specific parcels." This office believes that the unrestricted piecemeal release of the types of information at issue undercuts the association's contention that the information in fact is "secret." We therefore conclude that the district may not withhold the sales information under the "trade secret" branch of section 552.110.

As noted above, however, section 552.110 also protects "commercial or financial information obtained from a person." This material is clearly commercial information. To fall within section 552.110, however, it must be "privileged or confidential by statute or judicial decision."

Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. § 552(b). Open Records Decision Nos. 639 (1995), 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 1) to impair the Government's ability to obtain necessary information in the future¹; *or* 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Footnote and emphasis added.)

¹The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. This prong is intended to protect the governmental body's interest in non-disclosure. Because you have expressed no opinion on this subject, we deem this aspect of the section 552.110 claim as waived.

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

A factor to be considered in these tests is whether the information is of a type that is customarily released to the public. *See, e.g., AT&T Information Systems, Inc. v. General Services Administration*, 627 F. Supp. 1396, 1403 (D.D.C. 1986), *rev'd on other grounds*, 810 F.2d 1233 (D.C. Cir. 1987). Again, both you and the association have clearly stated that sales information from the MLS is customarily released to the public. We therefore conclude that the sales information may not be withheld under this branch of section 552.110.

We now address the association's other arguments for withholding the information under section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The association argues that the release of the sales price information implicates the property seller's privacy interests.

In Open Records Decision No. 373 (1983), this office concluded that common law privacy generally protects from public disclosure an individual's assets and income source information.

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.

Open Records Decision No. 373 at 3. This office then went on to conclude that because a requestor

may, by showing "special circumstances," overcome the presumption that there is no sufficient legitimate public interest in private information of an intimate nature, we conclude that the determination of whether the public's interest in obtaining this information is sufficient to justify its disclosure must be made on a case-by-case basis. As noted, however, in the usual situation, we do not believe that

financial information relating to an individual ... will be of legitimate public concern.

Id. at 4.

After reviewing Open Records Decision No. 373 and the information at issue, we conclude that the sales price of an individual's parcel of land would ordinarily constitute "highly intimate" financial information about the individual for purposes of the first prong of the common-law privacy test. In this instance, however, the requestor of the information at issue has argued that there is a legitimate public interest in the information. He explains that

on behalf of a group of Canyon Lake property owners, we requested information on sales and appraisals of lake front property, because it appears to us that some of the property owners with the most expensive property are getting preferential treatment by [the district], and that the lower value properties are being overvalued. This is our only source of information which will allow us to match sales with appraised values, and will prove or disprove our assumption. . . . The [district] has continuously violated this so called 'Confidential Agreement' when it is in their best interests to do so. However, when we need to prove inaccuracy they have refused this information.

We believe that in this instance the requestor has demonstrated a legitimate public interest that overcomes the presumption that the information at issue should be withheld on privacy grounds. The district therefore may not withhold the requested information pursuant to common-law privacy.

The association also argues that the information should be withheld from the public pursuant to section 552.104 of the Government Code. Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 was not intended to protect business entities that are in competition in the private sector. The primary purpose of section 552.104 is to protect the *government's* purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. There is in this instance no ongoing competitive situation to which the information at issue relates. Consequently, section 552.104 does not apply to the requested information.

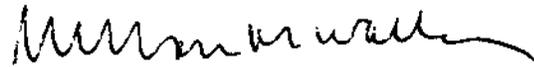
Finally, the association argues that the information at issue should be withheld because it is copyrighted material. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials where no exception to required public disclosure otherwise applies. Attorney

General Opinion JM-672 (1987) at 2-3. Also, the requestor may make copies of copyrighted materials unassisted by the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2.

Thus, assuming the requested material is in fact copyrighted, and in light of our discussion above, the district must allow the requestor to view the requested information and also allow him to reproduce the material without the district's assistance, so long as such reproduction would not unreasonably disrupt the district's working conditions. See Attorney General Opinion JM-757 (1987). It will be the requestor's responsibility to adhere to the federal copyright law.

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,



William M. Walker
Assistant Attorney General
Open Records Division

WMW/RWP/ch

Ref: ID# 121722

Enclosures: Submitted documents

cc: Mr. Odell Meredith
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(w/o enclosures)