



May 22, 2002

Ms. Merri Schneider-Vogel  
Bracewell & Patterson  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2002-2750

Dear Ms. Schneider-Vogel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162802.

The Houston Independent School District (the "district") received a written request for various categories of information pertaining to the testing of the district's students. You state that most of the requested information has either been released to the requestor or does not exist.<sup>1</sup> You contend, however, that information coming within the scope of the request for all "High School Proficiency Tests" developed by the district in the 1980's is protected by federal copyright laws. You have also requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public. Additionally, we have received comments from the requestor's attorney arguing why the requested information should be released. *See* Gov't Code § 552.304

In accordance with section 552.305(d), the district notified the Riverside Publishing Company ("Riverside") of the records request and of their right to submit arguments to this office as to why their respective application materials should not be released to the public. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party

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<sup>1</sup> The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor. Open Records Decision No. 445 (1986).

should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). This office received a response from Riverside arguing that the requested proficiency tests are excepted from public disclosure pursuant to section 552.110 of the Government Code.

Riverside contends that the requested proficiency tests constitute both "trade secret" information under section 552.110(a) and "commercial or financial" information under section 552.110(b) of the Government Code. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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). 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.<sup>2</sup> *See id.* This office has held that we must accept a 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. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (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).

After reviewing Riverside's arguments, we conclude that Riverside has not established that the requested proficiency tests come within either branch of section 552.110. Consequently, the tests must be released to the requestor, with the following caveat.

We note that both you and Riverside represent that the proficiency tests are copyrighted by Riverside. However, the test you submitted to this office for review indicates that the test is copyrighted by the district. Although 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 at 2-3 (1987).

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<sup>2</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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Consequently, if the district is the holder of the copyright, it is within the district's discretion to provide a copy of the proficiency tests to the requestor. In the event the district decides not to provide copies, the district must allow *inspection* of the copyrighted materials. See Attorney General Opinion JM-672 at 2-3 (1987). Also, the requestor may make copies of copyrighted materials unassisted by the district. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2. On the other hand, if in fact Riverside is the holder of the copyright, the district must only allow the requestor to view the copyrighted information and to reproduce the material without the district's assistance. In either event, it will be the requestor's responsibility to adhere to the federal copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

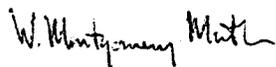
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/RWP/sdk

Ref: ID# 162802

Enc: Submitted documents

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