



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2003

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
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OR2003-8748

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191277.

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for information related to the: (1) office Building contemplated for lease and/or purchase by the University of Texas System, MD Anderson Cancer Center in Houston, Texas from Medistar Corporation, (2) donation, endowment, monies, and/or pledges that have been made by Medistar and its representatives, and (3) documents justifying lease space, Action Plan, RFQ, RFP, architectural drawings/plans, bid award, selection criteria, RFP submittals, and the entire file related to Medistar Corporation, Monzer Hourani, and Diana Elmas. The university received a second request from Jennifer Keane for certain information concerning Medistar Corporation and a building planned for the 6700 block of Main Street.¹ You claim that the requested information is excepted from disclosure under sections 552.104, 552.107, 552.137, and 552.1235 of the Government Code.² You also claim that the submitted information implicates the interests of third parties. You notified those parties of this request

¹ This ruling addresses some of the information responsive to Ms. Keane's request, mainly Medistar's information. The rest of the information will be addressed in a subsequent ruling, currently identified as ID# 194970.

² In your submission on November 5, 2003, you state the university wishes to withdraw its claim under section 552.104. Accordingly, we do not address section 552.104 of the Government Code in the present ruling.

and of their right to submit arguments to this office as to why information relating to the third parties should not be released. *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 Public Information Act in certain circumstances). We received arguments from representatives for Trammell Crow Company, Hammes Company, Medistar Corporation, and the Metrontario Group. We have reviewed the representative sample of information you submitted and considered all of the submitted arguments and the exceptions you claim.³ We have also received and considered the requestor's comments. *See* Gov't Code § 552.304.

We note that section 552.305 of the Government Code allows an interested third party ten business days from the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). However, as of the date of this letter, we have not received arguments for withholding the requested information from two of the interested third parties, Pin Oak Interests and Norvin Partners, Ltd. Therefore, we have no basis to conclude that the release of any of the submitted information would harm Pin Oak's or Norvin's proprietary interests. *See* Gov't Code § 551.110(b) (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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, the university must release Pin Oak's and Norvin's proposals.

Medistar, Hammes, Trammel Crow, and the Metrontario Group all contend that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. Medistar also asserts that portions of its proposal are excepted from disclosure under sections 552.104, 552.105, 552.107(2), and 552.131. Metrontario also contends that a portion of its proposal is excepted from disclosure under section 552.131.

Because all the third parties claim section 552.110, we address this exception first. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

³ We assume 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 records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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).⁴ 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 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974). An interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary

⁴ 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).

material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After reviewing the proposals and the third party briefs received by this office, we find that the Metrontario Group (tab 14) has sufficiently demonstrated that the release of Exhibit 8.6B, the AmSouth Bank letter, would cause the Metrontario Group substantial competitive harm for purposes of section 552.110(b). Accordingly, we conclude that the university must withhold the information within the Metrontario Group proposal that we have marked pursuant to section 552.110(b). Furthermore, the Metrontario Group has not demonstrated that the remaining information is a trade secret. Consequently, the remaining information contained in their proposal may not be withheld under section 552.110. Because Trammel Crow, Medistar and Hammes have failed to adequately demonstrate that any portion of their information constitutes confidential trade secrets under section 552.110(a) and have failed to show that the release of any portion of their information would cause them substantial competitive harm for purposes of section 552.110(b), we also conclude that the university may not withhold any portion of Trammel Crow's, Medistar's or Hammes' information under section 552.110 of the Government Code.

Metrontario and Medistar also claim that their proposals are excepted from disclosure under section 552.131 of the Government Code. Section 552.131(a) excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). Metrontario and Medistar have failed to demonstrate that their information constitutes trade secrets under section 552.131(a)(1) and have failed to show that the release of their commercial or financial information would cause them substantial competitive harm under section 552.131(a)(2). Therefore, the university may not withhold Metrontario's and Medistar's proposals under section 552.131.

Medistar also claims that their proposal is excepted from disclosure pursuant to sections 552.104 and 552.105 of the Government Code. We note, however, that sections 552.104 and 552.105 protect only the interests of governmental bodies, not those of private parties such as Medistar. *See* Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104), 564 at 2 (1990) (governmental body may waive statutory predecessor to section 552.105), 522 (1989) (discretionary exceptions in general). Therefore, Medistar's proposal is not excepted under sections 552.104 and 552.105 of the Government Code.

Medistar also argues that it is prohibited by a court order from disclosing their proposal to the requestor. Section 552.107(2) of the Government Code excepts information from public disclosure if "a court by order has prohibited disclosure of the information." Medistar has

submitted for our review a copy of the "Temporary Restraining Order." Upon review, we conclude that the temporary restraining order does not prohibit the release of any information. Therefore, Medistar's proposal is not excepted from disclosure under section 552.107(2) of the Government Code.

You also claim that tabs 7 and 9 contain confidential information that is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App. Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App. Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the submitted information includes communications between attorneys for and client representatives of the system. You state that these communications were made for the purpose of facilitating the rendition of professional legal services; that they were intended to be confidential; and that their confidentiality has been maintained. Based on

your representations, we conclude that you have shown that section 552.107(1) is applicable to the information in tabs 7 and 9. Because section 552.107 is dispositive, we do not address section 552.137.

The requestor also seeks information relating to donations, endowment, monies, and pledges that have been made by Medistar and its representatives. You claim section 552.1235 excepts this information from required public disclosure. Section 552.1235(a) excepts “the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” However, this section does not except from disclosure the amount or value of an individual gift, grant, or donation. *See* Gov’t Code § 552.1235(b).⁵ “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an “institution of higher education” as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. The university states it is a component of the U.T. System. Thus, we agree it qualifies as an “institution of higher education” under section 61.003 of the Education Code. Therefore, the name or other information that would tend to disclose the identity of a person who makes a gift, grant or donation of money or property to the university may be excepted from disclosure. Because section 552.1235 of the Government Code does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. Gov’t Code § 311.005(2). We have marked the names or other identifiable information of the persons who made a gift, grant, or donation to the university that are excepted from disclosure pursuant to section 552.1235 of the Government Code.

Tab 8 also contains information that is excepted from disclosure under section 552.101 of the Government Code and the doctrine of common-law privacy. Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open

⁵ Act of May 31, 2003, 78th Leg., R.S., ch. 1266, § 4.07, 2003 Tex. Sess. Laws Serv. 3587 (to be codified at Gov’t Code § 552.1235).

Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Having reviewed the information in tab 8, we find that some of the information is protected by common-law privacy and must therefore be withheld pursuant to section 552.101. We have marked this information.

In summary, the university must withhold the AmSouth Bank letter found in Exhibit 8.6B of the Metrontario Group's proposal pursuant to section 552.110(b) of the Government Code. Attorney-client communications found in tabs 7 and 9 are excepted from disclosure under section 552.107(1) of the Government Code. The names or other identifiable information of the persons who made a gift, grant, or donation to the university are excepted from disclosure under section 552.1235 of the Government Code. We have marked this information accordingly. Finally, private information we have marked in tab 8 must be withheld from disclosure pursuant to section 552.101 and common-law privacy. The remaining information must be released to the requestor.

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).

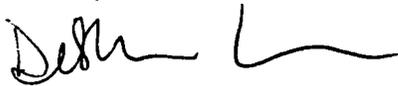
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 191277

Enc. Submitted documents

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