



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 18, 2004

Mr. Scott A. Kelley  
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OR2004-4076

Dear Mr. Kelley:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 201119.

The Texas Apiary Inspection Service of Texas A & M University (the "university") received a request for thirteen categories of information relating to the small hive beetle, including information related to persons or entities whose apiaries have been inspected for the small hive beetle. You claim that third-party interests may be implicated by this request, but you take no position on whether the requested information is excepted from disclosure. We note that you have submitted correspondence indicating that you have notified numerous third parties, whose information is at issue in the current request, pursuant to section 552.305 of the Government Code. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received arguments from several third parties (the "beekeepers"). We have considered all of the submitted arguments and

reviewed the submitted information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note, and you acknowledge, that the university has not complied with the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state that the university received the original request for information on December 27, 2003. The university did not request a decision from this office until March 16, 2004. Consequently, the university failed to request a decision within the ten-business-day period mandated by section 552.301(b) of the Government Code.

Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not submit any of the information required by section 552.301(e) within fifteen business days of receiving the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information confidential or when third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the beekeepers have claimed that confidentiality and third-party interests are at stake here, we will consider the beekeepers' arguments.

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<sup>1</sup>Although some of the beekeepers claim that their information may be withheld under section 552.305 of the Government Code, this section is not an exception to public disclosure. Rather, this section is a procedural provision permitting an interested third party to submit to the attorney general reasons why requested information should not be released. Gov't Code § 552.305; *see* 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). Thus, the university may not withhold any of the requested information under section 552.305.

We next note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, most of the notified third parties have not submitted to this office their reasons explaining why the requested information should not be released.<sup>2</sup> Consequently, these third parties have provided this office with no basis to conclude that their responsive information is excepted from disclosure. *See* Gov't Code § 552.110(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. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the university may not withhold any portion of the submitted information relating to the third parties who did not submit arguments to this office on the basis of any third party proprietary interest.

We note that several of the beekeepers argue that their information is private. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.<sup>3</sup> Section 552.101 encompasses the doctrines of common-law and constitutional privacy. Common-

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<sup>2</sup> This office has not received arguments from the following: Monte Ammann, Apostolic Bee Farm, A&B Bee Farm, Bachman Bee Farm, Bailey Enterprises, Inc., Mike Baribeau, Paul R. Bergling, Mike Block, Arnold Boehmlehner, Botno Bee Co., Brad Braaten, Brady Bees and Honey, Kerry Bramble, Eldon Brandt, Brandt Honey Producers, Keith Budke, Ernest Caldwell, Casavan Apiaries, Tony Ceballos, Larry Ceballos, Chris Charles, Mitchell Charles, Dwain Cleveland Anita Collins, Coplin Bee Farms, Dakota Bee, Danzig Honey, Co., D. Bar Farms, Dejno's Apiaries, Ken DeKnikker, Dominisse Honey Farms, Inc., Gary Eberly, Eastgate Industries, Elkhorn Valley Honey Co., Ellingson, Inc., Ellis Apiaries, John Faseler, Jerry Fetch, Fletcher Country Honey, Troy Fischer, Golden Valley Apiaries, Gordon Gause, James Griffith, John Griffith, Howard Halbgewachs, George Hamilton, Roger Hamilton, Hanson & Thompson, David Hansvold, Herrick Honey Farms, R.E. Herzog, Hoffman Honey Co., Tim Hollman, Homestead Apiaries, Honl's Bees, David Howard, Hutchison Apiaries and Quarter Horses, H&M Apiaries, Greg Johnson, Johnson's Honey, Jerel Johnson, DeNcy's, Inc., Steve Kellen, James E. Kellie, Kelly Honey & Bee Co., William T. Klett, Gary Kruse, Louis Kuebel, Gary Lamb, Jeff P. Lauritsen, Lockhart Apiaries, McEvoy's House of Honey, Magic Valley Honey, Rafael Maldonado, John L. Milam, Miller & Sons Apiaries, Bruce Moehling, Moore's Honey Farm, Robert Morlock, Walter Peters, Park Honey Co., Arlen Pietsch, R.J. Pillow Co., Price Apiaries, Inc., Eric Quail, Rambo Bee Farm, Robson Honey Co., William Robson, John/Don Roeder, Doug Ruby, Rufer's Apiaries, Inc, Rye Honey Farms, Sand Hills Honey Co., Allen Seilheimer, T'Lee X. Sellenberger, Kenneth Shearon, Don Shenefield, Clarence Shepherd, Spring Valley Honey Farms, Stahlman Apiaries, Mark Stroope, Rhea Stroope, John Talbert, Andrew L. Terry, Thomas Honey Farms, O.J. Thompson Apiaries, Ted Vance, Scott VandeHoef, William Vanderput, Randy Verhoek, Walker Apiaries, Steve Weber, Wiebersiek Honey Farm, Clint Weaver, Steve Weber, Walter Buzz Wilson, Woodworth Honey Co., Wordekemper Apiaries, and Jay Youngbluth.

<sup>3</sup> We note that some of the beekeepers assert that their trade secret and commercial financial information is confidential under section 552.101 of the Government Code. However, section 552.110 of the Government Code is the appropriate exception for this type of information. We will therefore address these arguments under section 552.110.

law 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon careful review of the submitted information, we conclude that it does not contain the type of information considered highly intimate or embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 480 at 7 (1987), 455 at 7, 8 (1987), 169 at 6 (1977). We further conclude that the submitted information does not fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the submitted information under section 552.101 and common-law or constitutional privacy.

We note that several of the beekeepers claim that their information is excepted from disclosure pursuant to section 552.104 of the Government Code. We note, however, that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991).

Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). We note that the university has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, we conclude that the university may not withhold any portion of the beekeepers' information under section 552.104 of the Government Code.

We also note that Mackrill Honey Farms & Sales states that its information is protected under section 552.113 of the Government Code. Section 552.113 protects certain "geological or geophysical information or data." Gov't Code § 552.113. However, because the submitted information does not constitute or contain geological or geophysical information or data, no portion of it may be withheld on the basis of section 552.113.

Several of the beekeepers argue that their information is excepted by section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret 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." *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person

establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>4</sup> See Open Records Decision No. 552 at 5 (1990). We cannot conclude, however, that section 552.110(a) is applicable 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 under section 552.110(a). See Open Records Decision No. 402 (1983) (addressing statutory predecessor).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See also Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having carefully reviewed all of the submitted arguments, we conclude that the beekeepers have not established a *prima facie* case for trade secret with regard to the submitted information; therefore, the university may not withhold any portion of the submitted information under section 552.110(a). However, English Honey Farms, R Weaver Apiaries, Inc., Kent Honeybees, Inc., and Royce Hollan have demonstrated that substantial competitive harm would result from the release of portions of their respective information. Therefore, we have marked portions of the submitted information relating to English Honey Farms, R Weaver Apiaries, Inc., Kent Honeybees, Inc., and Royce Hollan that the university must withhold under section 552.110(b) of the Government Code. We conclude that the remaining beekeepers have not presented arguments that adequately demonstrate how release of their information would cause them substantial competitive harm. Therefore, the university may not withhold any of the remaining information under section 552.110(b).

Finally, we note that Adee Honey Farms ("Adee") argues that its information is excepted pursuant to section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides:

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<sup>4</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

(a) Information is excepted from [required public disclosure] 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 territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* After reviewing Adee's arguments and the submitted information, we find that Adee has failed to adequately demonstrate that any portion of its information is excepted from disclosure as a trade secret of a business prospect or as commercial or financial information the release of which would cause substantial competitive harm to the person from whom the information was obtained. Further, we find that Adee has failed to adequately demonstrate that any portion of its information relates to a financial or other incentive being offered to a business prospect by a governmental body or another person.

We, therefore, conclude that the university may not withhold any portion of Adee's information under section 552.131 of the Government Code.

In summary, the university must withhold the portions of information relating to English Honey Farms, R Weaver Apiaries, Inc., Kent Honeybees, Inc., and Royce Hollan that we have marked under section 552.110(b) of the Government Code. 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,



Jennifer E. Berry  
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Open Records Division

JEB/sdk

Ref: ID# 201119

Enc: Submitted documents

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