



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2009

Ms. Renee Byas
General Counsel
Houston Community College
3100 Main
Houston, Texas 77002

OR2009-01687

Dear Ms. Byas:

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# 334387.

Houston Community College (the "college") received a request for eleven categories of information relating to certain surveillance equipment at the college's Coleman campus. You inform us that the college has no information that is responsive to parts of the request.¹ You have submitted information that the college seeks to withhold under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. You also believe that this request for information may implicate the proprietary interests of Kratos Defense & Security Solutions, Inc. ("Kratos"). You notified Kratos of this request for information and of its right to submit arguments to this office as to why the information should not be released.² We received correspondence from Kratos. We have considered all of the submitted arguments and reviewed the submitted information, some of which consists of a

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

representative sample.³ We also have considered the comments that we received from the requestor.⁴

You also point out that the requestor “request[s] the opportunity to inspect, examine and photograph the equipment in question.” You contend that the Act does not obligate the college to provide access to the equipment. The Act is applicable to “public information,” which is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. *See* Gov’t Code § 552.002. This office has ruled that tangible physical items are not “information,” as that term is contemplated under the Act. *See, e.g.*, Open Records Decision No. 581 (1990). We agree that the equipment is not public information, for the purposes of section 552.002 of the Government Code, and therefore the Act does not require the college to make the equipment available to the requestor in response to this request. *See* Gov’t Code §§ 552.002, .021.

You also state that the requestor was asked to clarify parts of her request for information that the college believes are repetitive or inclusive of other parts of the request.⁵ You have since informed us that the requestor has responded to the college’s request for clarification. You have provided a copy of the requestor’s response. You do not indicate, however, whether the college holds or has access to any information, other than the submitted information, that is responsive to the clarified parts of the request. Nevertheless, to the extent that the college holds or has access to any other information that is responsive to the clarified parts of the request, any such information must be released, unless the college has already done so. *See id.* §§ 552.301(a), .302; Open Records Decision No. 664 (2000).

We note that the submitted documents include purchase orders that fall within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(3). Although you seek to

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the college to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴*See* Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

⁵*See* Gov’t Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body’s communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under Gov’t Code § 552.301(b)).

withhold the purchase orders under sections 552.103, 552.108, and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.103, 552.108, and 552.111 are not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the purchase orders may not be withheld under section 552.103, section 552.108, or section 552.111. You also raise section 552.101 of the Government Code, which is other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, we will determine whether the college must withhold any of the information in the purchase orders under section 552.101. We also will consider all of your exceptions to disclosure of the remaining information. Additionally, we will address Kratos's claim under section 552.110 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). You believe that the submitted records, including witness statements and the representative sample of images from surveillance cameras, contain information whose release "would cause the affected parties unnecessary embarrassment." Having considered your arguments and reviewed the information at issue, we find that none of the submitted information is intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude that the college may not withhold any of the ~~remaining~~ submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.103 of the Government Code provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."⁶ *Id.* You contend that a threat of litigation is implicit in this request for information because the requestor has asked for an opportunity to inspect, examine, and photograph the surveillance equipment and also has asked that all information and tangible items related to the request for information be preserved from manipulation, alteration and destruction. You also point out that the requestor has sent a copy of the request to Kratos. Having considered your arguments, we find that you have not demonstrated that the college reasonably anticipated litigation on the date of its receipt of the request. *See Gov't Code § 552.103(c); 331 at 1-2 (1982)* (mere chance of litigation not sufficient to trigger section 552.103). We therefore conclude that the college may not withhold any of the remaining information under section 552.103 of the Government Code.

⁶Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

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Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You believe that the rest of the submitted information implicates the law enforcement interests of the college’s police department. However, having considered your arguments under section 552.108, we conclude that you have not sufficiently demonstrated that the release of the remaining information at issue would interfere with law enforcement. *See* Gov’t Code § 552.108(a)(1); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore conclude that the college may not withhold any of the remaining information under section 552.108 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You contend that some of the remaining information consists of “advice, recommendations, and opinions regarding administrative and personnel matters of broad scope that affect the [college’s] policy mission.” We find, however, that the remaining information is related to a specific administrative matter. Thus, having considered your arguments, we conclude that you have not sufficiently demonstrated that any of the remaining information implicates the college’s policymaking processes. Therefore, the college may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” 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.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas 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 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 . . . [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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁷ *See* Open Records Decision No. 552 at 5 (1990).

⁷The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

However, we cannot conclude 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. *See* Open Records Decision No. 402 (1983).

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* 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).

Kratos contends that its cost and pricing information is a trade secret of the company. Kratos also states, however, that the information at issue is contained in proposals that resulted in a contract with the college. Pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Likewise, the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We therefore conclude that the college may not withhold any of the submitted information under section 552.110 of the Government Code.

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- (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.

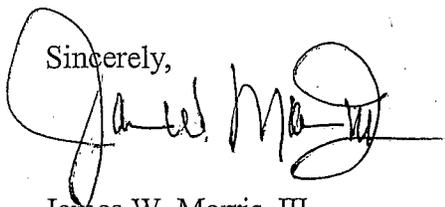
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

In summary, neither the college nor Kratos has demonstrated that any of the submitted information is excepted from public disclosure. Therefore, all of the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 334387

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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