



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2009

Mr. David Petruska
Petruska & Associates
5600 West Lovers Lane, Suite 116-361
Dallas, Texas 75209

OR2009-05976

Dear Mr. Petruska:

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# 341998.

Reeves County (the "county"), which you represent, received a request for all records maintained by the county pertaining to audits or accreditation reviews of the Reeves County Detention Center and Physicians Network Association ("PNA") to include the standards of review produced by the American Corrections Association and any policies or procedures associated with the health services provided by PNA. You state that you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. You also state the county notified PNA, the interested third party, of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have received comments from PNA. We have considered the submitted arguments and reviewed the submitted information.¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that a portion of the submitted information consists of an audit report prepared by the United States Department of Justice's Bureau of Prisons (the "bureau"). This report is subject to section 552.022 of the Government Code, which provides in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body;

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(1), (17). In this instance, the audit report contains a completed audit and court-filed documents. Section 552.022 makes this information expressly public. Therefore, the county may only withhold the information that is subject to section 552.022(a)(1) to the extent it is excepted from disclosure under section 552.108 or confidential under other law. Also, the county may withhold the information that is subject to sections 552.022(a)(17) only to the extent it is made confidential under other law. Although you raise section 552.111 of the Government Code for the information subject to 552.022, this exception is discretionary in nature. It serves only to protect a governmental body's interests and may be waived. As such, section 552.111 does not constitute other law for purposes of section 552.022. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the county may not withhold the information subject to section 552.022 under section 552.111 of the Government Code. However, because section 552.101 and third party interests are other law for purposes of section 552.022, and because section 552.108 is other law for purposes of section 552.022(a)(1), we will consider the arguments raised under these exceptions.

Next, we address the county's argument that portions of the submitted information are confidential under federal law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that chapter 552 of the United States Code, the federal Freedom of Information Act

("FOIA"), applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that: "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

In this instance, a portion of the submitted information consists of an audit which was provided to the county by the bureau. The county asserts, and provides documentation showing, that the bureau considers this information confidential under the deliberative process privilege found in section 552(b)(5) of the United States Code and under the personal privacy provisions found in section 552(b)(6) of the United States Code. *See* 5 U.S.C. § 552(b)(5), (6). Therefore, we conclude that the county must withhold the information it has marked under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code, which provides in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a "medical committee" includes any committee, including a joint committee, of . . . a hospital [or] a medical organization . . ." *Id.* § 161.031(a). The term "medical committee" also includes "a committee, including a joint committee, of one or more of the entities listed in Subsection (a)." *Id.* § 161.031(c). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] medical organization . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services . . ." *Id.* § 161.0315(a).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *See Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1

(Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other things, statutory predecessor to section 161.032).

You state a portion of the remaining information consists of the results and recommendations prepared by the Joint Commission on Accreditation of Healthcare Organizations (the “commission”) following an accreditation review. In *Humana Hospital Corporation v. Spears-Petersen*, the court found that the commission is a medical committee under section 161.031(a)(2), and its accreditation report of a hospital is confidential under section 161.032. *See Humana Hospital Corp. v. Spears-Petersen*, 867 S.W.2d 858 (Tex. App.—San Antonio 1993, no pet.). Based on your representations and our review, we conclude that the information you have marked constitutes records, information, or reports of a medical committee acting under subchapter D of chapter 161 of the Health and Safety Code. We therefore conclude that this information is confidential under section 161.032(a) of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.

Next, you claim some of the remaining information is confidential under section 552.101 in conjunction with the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a), (b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the

supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find none of the remaining information consists of communications between a physician and a patient, nor is it records of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, we conclude the county may not withhold any portion of the submitted information under section 552.101 in conjunction with the MPA.

We note the submitted information includes criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090-127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, you must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); see also Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." See *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. See, e.g., Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143

(1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state that the information you have marked under this exception concerns the security measures at the detention center, including information regarding fencing, lighting, alarm systems, and other electronic measures. Having considered your arguments and the information at issue, we conclude you have demonstrated how release of the information at issue would interfere with law enforcement and crime prevention. Therefore, the county may withhold the information you have marked under section 552.108(b)(1) of the Government Code.

In its brief to this office, PNA argues to withhold from public disclosure information which the county did not submit. This ruling does not address information that was not submitted by the county and is limited to the information submitted as responsive by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). 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); *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* ORD 232. This office must accept a claim that information subject to the Act is exempted 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). 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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). This exception to disclosure 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. *Id.*; *see also* Open Records Decision No. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

PNA claims that portions of its information are excepted from public disclosure under section 552.110(a) as trade secrets. Upon review, we find that the PNA has not demonstrated that the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Accordingly, the county may not withhold any of the PNA's information under section 552.110(a) of the Government Code.

We also find that PNA has failed to provide specific factual evidence demonstrating that release of any of its information would result in substantial competitive harm to the company. See ORD 661 at 5-6. Thus, we conclude that the county may not withhold any of PNA's information under section 552.110(b) of the Government Code.

We note that a portion of the remaining information is subject to section 552.137 of the Government Code.² Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). You do not inform us that the owner of the e-mail address at issue has affirmatively consented its to release. Therefore, the county must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, the county must withhold the information you have marked under section 552.101 of the Government Code in conjunction with federal law. The county must also withhold the information you have marked in conjunction with section 161.032(a) of the Health and Safety Code and the CHRI we have marked in conjunction with federal law and chapter 411 of the Government Code under section 552.101 of the Government Code. The county may withhold the information you have marked under section 552.108(b)(1) of the Government Code. The county must withhold the e-mail address we have marked under section 552.137 of the Government Code. The remaining information must be released.³

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,

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note that the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 that reads "Jonathan Miles". The signature is written in a cursive style with a large initial "J" and "M".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 341998

Enc. Submitted documents

c: Requestor
(w/o enclosures)