



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

June 4, 2003

Mr. Steve Aragon  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2003-3825

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182173.

The Texas Health and Human Services Commission (the "commission") received a request for four categories of information related to Public Consulting Group, Inc. ("PCG"). You claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. You also state that the requested information may be confidential under section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified PCG of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 Public Information Act (the "Act") in certain circumstances). This office has received a response from PCG objecting to the release of portions of its information. We have considered the exceptions claimed and have reviewed the submitted information. We have also considered written comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides that

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:

- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate

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Gov't Code § 552.022(a)(5). The submitted documents include information that is subject to section 552.022(a)(5) and must be released on completion of the estimates, unless it is expressly confidential under other law. We note that section 552.111 of the Government Code is a discretionary exception to disclosure under the Act that protects the governmental body's interests and may be waived.<sup>1</sup> As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022(a). Accordingly, we conclude that the department may not withhold the submitted information that is subject to section 552.022 under section 552.111 of the Government Code. We note, however, that section 552.110 constitutes "other law" for purposes of section 552.022.

We now turn to your argument under section 552.111 in relation to the information not subject to section 552.022. Section 552.111 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." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive predecessor to section 552.111). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

We note that the much of the information at issue involves PCG, a private entity. Section 552.111 can encompass communications between a governmental body and a third party acting as a consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (predecessor to section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (predecessor to section 552.111 applies to memoranda prepared by governmental body's consultants). After reviewing the information at issue, we find that some of it constitutes interagency or intraagency communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the commission. Therefore, you may withhold the information we have marked under section 552.111. We find that you have not demonstrated the applicability of section 552.111 to any of the remaining information.

We now turn to PCG's arguments for the information not excepted under section 552.111. First, we note that much of the information at issue has been designated as confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). *See also* Open Records Decision No. 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

PCG claims that portions of its information are excepted under section 552.110 of the Government Code.<sup>2</sup> This exception 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) "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that

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<sup>2</sup> We note that PCG seeks to withhold information it has submitted to this office. The information submitted to this office by the commission contains much of this information. However, the information submitted by PCG contains some information that is not contained in the information submitted by the commission for review. This ruling does not address such information, and is limited to the information submitted as responsive by the commission. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (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>3</sup> *See Open Records Decision No. 552 at 5 (1990).*

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

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<sup>3</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 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).*

enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon considering the submitted arguments and the information at issue, we conclude that PCG has demonstrated that some of its information, which we have marked, constitutes commercial or financial information the disclosure of which would cause substantial competitive harm. Therefore, it must be withheld under section 552.110(b). As we are able to make this determination, we need not address PCG's claim under section 552.110(a) for this information. We further find that PCG has not demonstrated that any of its remaining information constitutes trade secret information under section 552.110(a) or commercial or financial information protected under section 552.110(b).

In summary, you may withhold the information we have marked pursuant to section 552.111. You must withhold the information we have marked pursuant to section 552.110. The remaining submitted information must be released.

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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 182173

Enc. Submitted documents

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