



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2004

Ms. Hadassah Schloss
Open Records Administrator
Texas Building and Procurement Commission
P.O. Box 13047
Austin, Texas 78711

OR2004-3778

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#'s 200157 and 200484. Your requests have been combined and will be considered under ID# 200157.

The Texas Building and Procurement Commission (the "commission ") received four requests from two requestors for information relating to Request for Proposals ("RFP") No. 300-4-01, Tourism Public Relations and Trade Relations Representation Services. The first three requests are for specified information relating to the responses to the RFP and the commission's review of the responses.¹ The fourth request is for all of the responses. You inform us that some of the requested information does not exist. The Act does not require the commission to release information that did not exist when it received these requests or to create responsive information.² You also inform us that some of the requested

¹We note that the first requestor also asks several questions. The Public Information Act (the "Act"), chapter 552 of the Government Code, does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). A governmental body must make a good-faith effort, however, to relate a request to any responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990).

²*See Economic 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).

information has been released. You have submitted other responsive information that you claim is excepted from disclosure under section 552.111 of the Government Code. Although you take no position with regard to the public availability of the remaining information that you have submitted, you believe that this information implicates the proprietary interests of third parties under section 552.110 of the Government Code. You notified the interested third parties of these requests for information and of their right to submit arguments to this office as to why the third parties' information should not be released.³ We also received correspondence from attorneys for Daniel J. Edelman, Inc. ("Edelman"); Lou Hammond & Associates, Inc. ("Hammond"); and Interlex. We have considered all of the submitted arguments and have reviewed the submitted information.

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 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). As of the date of this decision, we have received no correspondence from Fleishman-Hilliard, Inc.; GTS Worldwide, LLC; KWGC, Inc.; Vollmer Public Relations; or Weber Shandwick Southwest. Consequently, none of these parties has demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments of Edelman, Hammond, and Interlex under section 552.110. This section 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." 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

³*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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), *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.⁴ *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).

Edelman asserts that portions of its proposal are excepted from disclosure under section 552.110. Hammond generally asserts that its entire proposal is excepted from disclosure under section 552.110. Having considered the parties’ arguments, we conclude that Edelman and Hammond have not demonstrated that any of the information contained in their respective proposals is excepted from disclosure under section 552.110. *See* Gov’t Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too

⁴The 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).

speculative), 494 at 6 (1988) (general allegations of unspecified competitive harm not sufficient under statutory predecessor to Gov't Code § 552.110), 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Interlex argues that portions of its proposal constitute trade secrets under section 552.110(a). Interlex also contends that portions of its proposal are excepted from disclosure under section 552.110(b). Having considered these arguments, we conclude that Interlex has established a *prima facie* claim that the company's own customer information qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut Interlex's trade secret claim as a matter of law. We therefore conclude that the Interlex customer information that we have marked is excepted from disclosure under section 552.110(a). We also conclude that Interlex has demonstrated that information contained in the company's marketing budgets is excepted from disclosure under section 552.110(b). We also have marked that information. Otherwise, we conclude that Interlex has not established that any of the remaining information encompassed by the company's arguments qualifies as a trade secret under section 552.110(a). We likewise conclude that Interlex has not made the required demonstration under section 552.110(b) that the release of any of the remaining information encompassed by Interlex's arguments would be likely to cause Interlex substantial competitive harm. We therefore conclude that none of the remaining information encompassed by Interlex's arguments is excepted from disclosure under section 552.110. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988), 494 at 6 (1988), 319 at 3 (1982).

Next, we address the commission's claim under section 552.111. This section excepts from required public 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. Section 552.111 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* Open Records Decision No. 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) (section 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* Open Records Decision No. 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).

The commission raises section 552.111 with regard to records of the commission's review of the responses to the RFP, including comments made by the individuals who ranked the proposals and the names of those individuals. The commission asserts that the comments represent advice, opinion, or recommendations made during a decision-making process. The commission also argues that the individuals' names should be protected to preserve and encourage frank and open discussion during the decision-making process. Having considered these arguments, we conclude that the commission may withhold the comments and scoring information contained in the review materials under section 552.111. We also conclude, however, that section 552.111 is not applicable to the names of the individuals who reviewed the proposals, and therefore the commission may not withhold any of the individuals' names under section 552.111.

Lastly, we note that the proposals of Edelman, Interlex, GTS Worldwide, LLC; KWGC, Inc.; and Vollmer Public Relations contain information that is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with the copyright law, however, and is not required to furnish copies of records that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the commission must withhold the marked information relating to Interlex that is excepted from disclosure under section 552.110; and (2) the commission may withhold the comments and scoring information in the review materials under section 552.111. The commission must release the rest of the submitted information. In releasing information that is protected by copyright, the commission must comply with copyright law.

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).

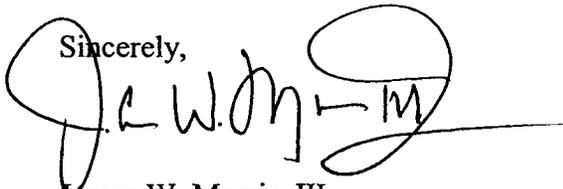
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 200157

Enc: Submitted documents

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