



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 24, 2006

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OR2006-03666A

Dear Mr. Bounds:

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# 253587.

This office issued Open Records Letter No. 2006-03666 (2006) on April 12, 2006. In that ruling, we determined the San Antonio Water System (the "SAWS") had failed to timely submit information under the Act's statutory deadlines. Based on information the SAWS submitted subsequent to the issuance of the decision, we now determine that the SAWS complied with the Act in a timely manner. *See* Gov't Code 552.301 (addressing governmental bodies procedural obligations under the Act). Consequently, this decision serves as the correct ruling on this request and is a substitute for the decision issued on April 12, 2006. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Act).

The San Antonio Water System (the "SAWS"), which you represent, received a request for "any and all documents, bids, estimates related to retrofitting, reconstructing, and/or remodeling the Buttercrust building on Broadway both prior to SAWS purchase of the building and after the purchase" and "a copy of the purchase contract for the SAWS building on [Highway] 151 and the intended use of the building." You state that the SAWS has or will make some of the requested information available to the requestor. You claim that the information submitted in Box 1 is excepted from disclosure under sections 552.105 and 552.107 of the Government Code. Although the SAWS makes no arguments against

disclosure of the information submitted in Box 2, the SAWS believes this information may involve the third-party proprietary interests of: 3D/International ("3D/I"); Austin Commercial; The Austin Company; Bartlett Cocke General Contractor ("Bartlett Cocke"); BOKA Powell Architects ("BOKA"); Contractors & Associates, Inc. ("Contractors"); Faulkner USA ("Faulkner"); Ford, Powell & Carson ("FPC"); Kell Munoz; Koontz McCombs Construction, Ltd. ("Koontz McCombs"); Lake/Flato; Lyda Builders, Inc. ("Lyda"); Marmon Mok, L.L.P.; MW Builders of Texas, Inc. ("MW"); Opus West Corporation ("Opus"); Overland Partners ("Overland"); Rector Management ("Rector"); REH Burwell Partners ("REH"); Rehler, Vaughn & Koone, Inc. ("RVK"); Ryan Companies U.S., Inc. ("Ryan"); SpawGlass Contractors, Inc. ("SpawGlass"); Yates Construction ("Yates"); and Zachry/HKS ("Zachry"). Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the SAWS notified the third parties of the request for information and of their right to submit arguments explaining why the information concerning these companies should not be released. *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 certain circumstances). We have considered all arguments and reviewed the submitted information.<sup>1</sup> *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.305 of the Government Code allows an interested third party ten business days from the date of its receipt of the governmental body's notice 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 letter, we have not received arguments from Bartlett Cocke, BOKA, Contractors, FPC, Kell Munoz, Koontz McCombs, Lake/Flato, Lyda, Marmon Mok, Opus, Overland, Rector, REH, RVK, SpawGlass, Yates, or Zachry. Therefore, we have no basis to conclude that the release of the submitted information would harm the proprietary interests of these third parties. *See* Gov't Code § 551.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, we conclude that the SAWS may not withhold any portion of the submitted information on the basis of any proprietary interest that these third parties may have in the information.

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<sup>1</sup>In its brief, MW raises section 552.305 of the Government Code as an exception to disclosure. We note, however, that section 552.305 is not an exception to disclosure under the Act. Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private or proprietary while the governmental body is seeking an attorney general's decision under the Act.

We turn next to the arguments submitted by interested third parties 3D/I, Austin Commercial, Faulkner, and MW. We note that 3D/I seeks to withhold information that the SAWS has not submitted to this office for review.<sup>2</sup> This ruling does not address the arguments submitted by 3D/I pertaining to information that has not been submitted for our review by the SAWS. *See Gov't Code § 552.301(e)(1)(D)* (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested). Because 3D/I makes no arguments for the information that the SAWS has submitted, we conclude that the submitted information pertaining to 3D/I may not be withheld on the basis of 3D/I's proprietary interest.

MW asserts that portions of its information are excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, MW does not cite to any specific law, and we are not aware of any, that makes any portion of the information at issue confidential under section 552.101. *See generally* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, we conclude that the SAWS may not withhold any portion of the information at issue under section 552.101 of the Government Code.

We now address the arguments of Austin Commercial, Faulkner, and MW under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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)*.

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 Gov't Code § 552.110(a)*. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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

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<sup>2</sup> Specifically, 3D/I seeks to withhold its audited financial information. The SAWS has not submitted such information to this office.

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.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> This office must accept a claim that information subject to the Act is excepted 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 National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(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).

Upon review of the submitted information, we conclude that Austin Commercial, Faulkner, and MW have failed to show any of their information is excepted from disclosure as a trade secret under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (defining trade secret); *see also* Huffines, 314 S.W.2d at 776 (defining trade secret). Therefore, none of the submitted information pertaining to Austin Commercial, Faulkner, and MW may be withheld under section 552.110(a).

However, we find that MW has made a specific factual or evidentiary showing that release of portions of its information, which we have marked, would cause it substantial competitive harm. Therefore, the SAWS must withhold this marked information pursuant to section 552.110(b). With respect to the remaining information at issue, we find that Austin Commercial and Faulkner have failed to establish that release of any of their information would cause them substantial competitive injuries for purposes of section 552.110(b). *See* 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 speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, none of the remaining information at issue may be withheld pursuant to section 552.110(b).

We turn next to your arguments for the information submitted in Box 1. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not

intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information submitted in Box 1 “constitutes communications exchanged between SAWS staff, its consultants, SAWS’ in-house attorneys . . . and SAWS’ outside counsel[.]” You further state that “the communications were exchanged in furtherance of an attorney’s rendition of professional legal services to SAWS.” You indicate that the confidentiality of these communications has been maintained. Upon review of your arguments and this information, we conclude that it is protected by the attorney-client privilege, and thus may be withheld under section 552.107(1) of the Government Code. As our ruling on this issue is dispositive of the information submitted in Box 1, we need not address your remaining argument for this information.

We note that some of the submitted proposals contain insurance policy numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”<sup>4</sup> Gov’t Code § 552.136. In accordance with section 552.136, the SAWS must withhold the insurance policy numbers in the submitted proposals.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).*

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

In summary, the SAWS must withhold the information we have marked under section 552.110(b) of the Government Code. The information the SAWS submitted in Box 1 may be withheld under section 552.107 of the Government Code. In addition, the information we have marked must be withheld under section 552.136 of the Government Code. The remaining submitted information must be released to the requestor. In releasing those portions of the submitted information that are protected by copyright, the SAWS 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments with in 10 calendar days of the date of this ruling.

Sincerely,



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LJJ/sdk

Ref: ID# 253587

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