



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 31, 2007

Ms. Carol Longoria  
Office of the General Counsel  
University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2007-06823

Dear Ms. Longoria:

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# 278730.

The University of Texas System (the "system") received a request from Representative Lon Burnam for specified documents pertaining to the system's bid for a Department of Energy ("DOE") contract for management of the Los Alamos National Laboratory. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.111, and 552.137 of the Government Code. You also inform us that you notified Lockheed Martin ("Lockheed") 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) (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 to disclosure in certain circumstances). We have reviewed the submitted information and arguments submitted by the system and Lockheed.

Initially, we note that the submitted information contains a completed report and a contract that are subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides in relevant 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,

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Accordingly, we find that the Report on Los Alamos National Laboratory completed by the system interim vice chancellor in Tab 5 and the Teaming Agreement between the system and Lockheed in Tab 9 are expressly public under sections 552.022(a)(1) and section 552.022(a)(3) respectively. Thus, this information may only be withheld if confidential under other law or, in the case of the completed report in Tab 5, excepted from disclosure under section 552.108 of the Government Code. You seek to withhold Tabs 5 and 9 under section 552.111 of the Government Code. However, section 552.111 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; 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). Because this section is not other law that makes information confidential for the purposes of section 552.022, the system may not withhold the marked report and Teaming Agreement under section 552.111 of the Government Code. However, because section 552.022 does not apply to information that is excepted from disclosure under section 552.104 of the Government Code, we will address your argument for withholding this information, along with the remaining submitted information, under section 552.104. *See* Gov't Code § 552.104(b).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's

demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

In this instance, although you acknowledge that the system is no longer involved in bidding for the DOE contract at issue, you assert that the information at issue may be valuable if a similar opportunity arises in the future, and could “undermine [the system’s] ability to optimize the financial benefit of future collaborative projects.” You also argue that release of the submitted information would put the system at a disadvantage to other research facilities when competing for partnerships. However, beyond the possibility of unidentified future opportunities, you have not identified a specific threat of actual harm to the system. Further, you have failed to demonstrate how release of this particular information could be used by a competitor in a specific competitive situation. Thus, after carefully reviewing your arguments and the submitted information, we find that the system has failed to adequately demonstrate that the release of the submitted information would harm the competitive interests of the system for purposes of section 552.104. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body’s interests in competitive bidding situation). Accordingly, we conclude that the system may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Next, you assert that Tab 7 is excepted from disclosure under section 552.107. 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

In this case, the information at Tab 7 consists of communications made for the purpose of facilitating the rendition of professional legal services. The communications are between clients, client representatives, lawyers, and lawyer representatives identified by the system, and you assert that the communications were intended to be kept confidential among the intended parties. Finally, you state that the system has maintained the confidentiality of these communications at all times. Thus, you may withhold Tab 7 under section 552.107(1) of the Government Code.

Next we address your argument under section 552.111 of the Government Code for the remaining 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" and 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. 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)*. 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. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *ORD 615 at 4-5*.

You assert that the information in Tab 5 consists of exchanges of opinion, advice, and recommendations pertaining to issues and proposed methods of action involved in the system bid for the DOE contract at issue. You also assert that the information in Tab 6 consists of opinion, advice, and recommendations pertaining to the systems policy for handling media and public perception. Based on your representations and our review of the information at issue, we find you have established that the information we have marked under section 552.111 consists of advice, opinion, or recommendations related to system policy. However, the remaining information consists of factual information, or fails to reveal the actual advice, recommendation, or opinion at issue. Therefore, section 552.111 is applicable only to the information we have marked in Tabs 5 and 6.

You also assert that Tab 9 is excepted from disclosure under section 552.111 of the Government Code. However, you have failed to provide any specific arguments explaining how section 552.111 is applicable to the information in Tab 9. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Accordingly, section 552.111 is not applicable to Tab 9.

Lockheed asserts that some of the submitted information is excepted under section 552.110 of the Government Code. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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. . . . 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); *see also* *Huffines*, 314 S.W.2d at 776. 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). 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. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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).

Lockheed argues that the information at issue consists of sensitive commercial and financial information, and that release of the submitted information would cause Lockheed competitive harm. The information consists of a teaming agreement between the system and Lockheed, a chart laying out the team organization of the partnership between the system and Lockheed, a request for indemnification pertaining specifically to the DOE contract bid, an e-mail conversation pertaining to team member compensation, and a portion of the specific DOE bid at issue. Having considered Lockheed's arguments and reviewed the information, we find that Lockheed has not demonstrated that any of the submitted information qualifies as a trade secret under section 552.110(a). *See* Open Records Decision 552 at 5-6 (1990), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* Restatement of Torts § 757 cmt. b (1939) (information is generally not trade secret if 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"). We also find that Lockheed has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause Lockheed substantial competitive harm. Therefore we conclude that section 552.110 is not applicable to any of the information at issue. *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). Accordingly, the system may not withhold any of the submitted information based on Lockheed's proprietary interests.

Finally, the remaining information contains e-mail addresses that are excepted from disclosure under section 552.137 of the *Government Code*, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. See Gov't Code § 552.137 (b). You do not inform us that the owner of any of the email addresses has affirmatively consented to release. Therefore, the system must withhold the e-mail address we have marked under section 552.137.

In summary, you may withhold Tab 7 under section 552.107 of the *Government Code*. You may withhold the marked portions of Tabs 5 and 6 under section 552.111 of the *Government Code*. You must withhold the e-mail addresses that we have marked under section 552.137. The remaining information must be released to the requestor.

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).

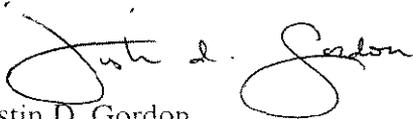
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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 within 10 calendar days of the date of this ruling.

Sincerely,



Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/eeg

Ref: ID# 278730

Enc. Submitted documents

c: Representative Lon Burnam  
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(w/o enclosures)