



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 17, 2007

Mr. Miles Risley  
Senior Assistant City Attorney  
City of Victoria  
P.O. Box 1758  
Victoria, Texas 77902-1758

OR2007-16621

Dear Mr. Risley:

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# 296134.

The City of Victoria (the "city") received a request for information concerning a specified city lighting contract. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.110 of the Government Code. Although you raise sections 552.101 and 552.110 of the Government Code as possible exceptions to disclosure for the requested information, you make no arguments as to whether the submitted information is excepted under those sections. You also state that releasing a portion of the submitted information may implicate the interests of a third party. Accordingly, you have notified Musco Sports Lighting ("Musco") of the request and of its opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that because some of the submitted information was created after the date that the city received the request, the documents we have marked are not responsive to the

instant request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The city received the request for information on September 17, 2007. However, although the city requested a ruling and raised section 552.107 within the ten business day deadline, the city failed to submit a portion of the submitted information until October 30, 2007. Thus, the department failed to comply with the procedural requirements mandated by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See *id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. See Open Records Decision No. 150 at 2 (1977). You assert that a third party has an interest in the information that you submitted after the fifteen business day deadline. Thus, we will consider the arguments against disclosure of the information submitted on October 30, 2007, as well as the timely submitted information.

You assert that a portion of the submitted information is excepted under section 552.107 of the Government Code, which protects information 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 Texas 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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)-(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. Finally, 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 the definition of a confidential communication 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). We note that communications with third party consultants with which the city shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state that a portion of the submitted information constitutes confidential attorney-client communications between or among lawyers or lawyer representatives of the city and city staff. You further contend that these communications were made for the purpose of facilitating the rendition of professional legal services and were intended to be confidential. We note, however, that you have failed to identify any of the parties to the communications or explain their relationship with the city. However, upon review, we have been able to discern that certain individuals are privileged parties. Accordingly, the city may withhold the information we have marked under section 552.107 of the Government Code. However, we determine that the city has failed to demonstrate that any portion of the remaining information, which we have marked for release, constitutes attorney-client communications.

We note that this information also 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 owners of the e-mail addresses have affirmatively consented to their release. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

Next, you assert that a portion of the information you submitted on October 30, 2007 is excepted from disclosure under section 552.110 because it is marked confidential. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 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.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless Musco's information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Musco argues that portions of its proposal are excepted from public disclosure under section 552.101 of the Government Code in conjunction with rule 507 of the Texas Rules of Evidence.<sup>1</sup> We note that this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information confidential for the purposes of section 552.022. *See* Gov't Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under other law); *see also In re City of Georgetown*, 53S.W.3d 328 (Tex. 2001). In this instance, Musco's information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Evidence are not applicable. We also note that section 552.101 does not encompass civil discovery privileges. *See* Open Records Decision No. 647 at 2 (1996). Accordingly, we conclude that the city may not withhold any portion of Musco's information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence.

---

<sup>1</sup>Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101.

Next, Musco asserts that portions of its submitted information constitute trade secrets. Section 552.110(a) protects trade secrets. *See* Gov't Code § 552.110(a). 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).

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).

Upon review, we conclude that Musco has established a *prima facie* case that the marked light structure pole and foundation data and diagrams constitute trade secrets, and must be withheld under section 552.110(a). We note, however, that 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." Restatement of Torts § 757 cmt. b (1939). Musco acknowledges in its brief, and the remaining information at issue reflects, that the information at issue pertains to choices and suggestions made for the particular complex at issue. Musco also states the documents

reveal design decisions unique to this particular project. Further, the information at issue indicates that it was created or prepared for use in this project only. Thus, we conclude that Musco fails to make a prima facie showing that any of the remaining information at issue consists of a trade secret. *See* Open Records Decision No. 552 at 5-6 (1990). Accordingly, no portion of Musco's remaining information may be withheld under section 552.110(a) of the Government Code. As no other exception to disclosure of the remaining submitted information is raised, it must be released to the requestor.

Finally, we note that a portion of the submitted information contains notice of copyright protection. 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).

In summary, you may withhold the information we have marked under section 552.107 of the Government Code. You must withhold the e-mail addresses we have marked under section 552.137. You must withhold the information we have marked under section 552.110. The remaining information must be released to the requestor in accordance with copyright.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

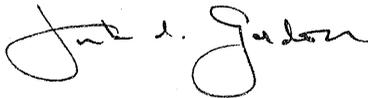
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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/jh

Ref: ID# 296134

Enc. Submitted documents

c: Mr. Steve Orsak  
Sport Facilities Co.  
22803 Merrymount  
Katy, Texas 77450  
(w/o enclosures)

Mr. Jeffrey S. Boyd  
Thompson & Knight, LLP  
1900 San Jacinto Center  
98 San Jacinto Boulevard  
Austin, Texas 78701-4238  
(w/o enclosures)