



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 1, 2009

Ms. Maria Smith  
North Texas Tollway Authority  
P.O. Box 260729  
Plano, Texas 75026

OR2009-13829

Dear Ms. Smith:

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# 356982.

The North Texas Tollway Authority (the "authority") received a request for all correspondence, including correspondence between the authority and a specified television network, during a specified period of time relating to tollway signage, wrong way crashes, and the installation of any new countermeasures. You state you are providing portions of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.110, 552.111, and 552.137 of the Government Code. You also state that some of the submitted information may contain the proprietary information of third parties subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you have notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits

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<sup>1</sup>The third parties that received notice pursuant to section 552.305 are the following: Hy-Viz Incorporated; Paradigm Traffic Systems; Skyline Products, Inc.; Silicon Constellations, Inc.; Spot Devices; TAPCO, Traffic & Parking Control, Inc.; TransCore ITS, LLC ("TransCore"); and Trans-Tech.

governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from TransCore. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the submitted information, which we have marked, is not responsive to this request because it does not pertain to the time period specified in the request for information. This ruling does not address the public availability of non-responsive information, and the authority is not required to release non-responsive information in response to this request.

Next, we note that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-13314 (2009). In that ruling, we found that the authority may withhold the information we marked in the submitted e-mails under section 552.111 of the Government Code. With regard to the requested information that is identical to the information previously submitted and ruled upon by this office in the prior ruling, we conclude that, as we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the authority may continue to rely upon Open Records Letter No. 2009-13314 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances, on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments regarding the remaining information, which has not been previously ruled upon.

Next, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only TransCore has submitted to this office reasons explaining why its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3 (1990). Therefore, the authority may not withhold any portion of the submitted information on the basis of any proprietary interest that the remaining third parties may have in this information.

TransCore claims its submitted information is excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the authority has not claimed that any of the submitted information is excepted from disclosure under section 552.104, we find that this section is not applicable to TransCore's information. *See* ORD 592 (governmental body may waive section 552.104).

Although the authority argues that portions of the submitted information are excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will only address TransCore's arguments under section 552.110. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. *Id.* § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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. 1957); *see also* ORD 552 at 2. 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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because 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; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) of the Government Code 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* ORD 661 at 5-6.

TransCore asserts that the release of TransCore's proprietary technical design and cost information related to wrong-way detection systems are confidential and that release of this information would cause TransCore irreparable harm. Upon review, we find that TransCore has failed to demonstrate how any of its information at issue meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. Thus, TransCore has failed to establish that any portion of its information constitutes a protected trade secret under section 552.110(a) of the Government Code.

TransCore also seeks to withhold portions of its remaining information under section 552.110(b). Upon review, we determine that TransCore has established that its pricing information within the submitted e-mails, which we have marked, constitutes

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<sup>2</sup>The following are the six factors that the Restatement gives 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).

commercial or financial information, the release of which would cause TransCore substantial competitive injury. Therefore, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that TransCore has only made conclusory allegations that release of its remaining information would result in substantial damage to its competitive position. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, TransCore has not demonstrated that substantial competitive injury would result from the release of this information. *See* ORD 661 at 5-6. With respect to the pricing information in TransCore's prior proposal to Harris County, we note that this office considers pricing information in government contracts to be a matter of strong public interest. *See generally* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, we determine the authority must only withhold the information we have marked under section 552.110 of the Government Code.

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 pet.). 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).

The authority claims that the information in Exhibit D consists of communications of authority employees seeking legal advice from attorneys representing the authority. You have identified the parties to the communications. You state that the communications were meant to be confidential and that confidentiality has been maintained. Upon review, we find that the authority may withhold the information in Exhibit D under section 552.107 of the Government Code.<sup>3</sup>

Section 552.111 of the Government Code 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.” Gov’t Code § 552.111. This section incorporates the deliberative process privilege into the Act. Open Records Decision No. 647 at 5-6. 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*

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining argument for this information.

*Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state that Exhibits B and C contain the advice, recommendations, and opinions of authority staff, authority consultants, and representatives of other governmental agencies that share a privity of interest with the authority with respect to wrong way driver policy-making objectives and strategy of the authority. Based on your representations and our review of the information at issue, we find that the authority has sufficiently demonstrated how some of the information in Exhibits B and C pertains to the authority's policymaking processes and contains the advice, recommendations, and opinions of authority staff, authority consultants, and representatives of other governmental agencies that share a privity of interest with the authority regarding these policy issues. Furthermore, you inform us that you are releasing final versions of the attached draft documents and communications to the requestor. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the information within Exhibits B and C. Therefore, the authority may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information in Exhibits B and C appears to consist either of general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking of the authority. In addition, you have failed to demonstrate how the authority shares a privity of interest with some of the third parties at issue. Accordingly, the authority

may not withhold the remainder of Exhibits B and C under the deliberative process privilege of section 552.111.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses you have marked, in addition to the e-mail addresses we have marked, in the remaining information are not of a type specifically excluded by section 552.137(c). *See* Act of May 15, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 651, 651–52, *amended by* Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, 2009 Tex. Sess. Law Serv. 2555, 2557 (Vernon) (to be codified as an amendment to Gov’t Code § 552.137(c)). You state the authority has not received consent for their release. Therefore, the authority must withhold the marked e-mail addresses in accordance with section 552.137 of the Government Code.

We note some of the remaining information appears to 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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, the authority may withhold the information in Exhibit D under section 552.107 of the Government Code. The authority must withhold the information we have marked under section 552.110 of the Government Code. The authority may withhold the information we have marked under section 552.111 of the Government Code. The authority must withhold the marked e-mail addresses in accordance with section 552.137 of the Government Code. The remaining information must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/jb

Ref: ID# 356982

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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