



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2009

Ms. Maria Smith
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75026

OR2009-18158

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# 365151.

The North Texas Tollway Authority (the "authority") received a request for all information pertaining to the acquisition of the billboards located in the I-30 corridor in Garland, Texas, including correspondence and appraisals.¹ You state you will make some of the requested information available to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² You state that release of the submitted information may implicate the proprietary interests of third parties. Pursuant to section 552.305, you inform us, and provide documentation showing, you have notified the interested third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released.³ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested

¹You state the authority sought and received clarification of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We note that although you initially raised sections 552.101, 552.105, 552.110, and 552.137 of the Government Code, you have not submitted any arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information.

³The interested third parties are: Faulkner Investment Company, Ltd. ("Faulkner"), Widely Investment, L.P., Steven Wilder, Mark Wilder, Thad Wilder, and Alva Wilder.

third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). You also indicate the request may implicate the interests of the Texas Department of Transportation (the "department") and the City of Garland (the "city"), and you have also notified them of their right to submit arguments to this office as to why the requested information should not be released. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from an attorney for Faulkner. We have considered the submitted arguments and reviewed the submitted information, portions of which are representative samples.⁴

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of the request. Furthermore, you have marked information as not responsive. This ruling does not address the public availability of any information that is not responsive to the request and the authority is not required to release that information in response to the request.

Next, you raise section 552.107 of the Government Code for portions of the remaining information. Section 552.107(1) 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 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). 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, lawyer representatives, and a lawyer representing another party or its representative, in a pending action and concerning a matter of common interest therein. See 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. 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

⁴We assume that the representative samples of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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).

You state the information you have labeled consists of confidential communications between authority staff, consultants, and the authority’s outside counsel. You indicate the information at issue also includes confidential communications between authority staff, the department, and the city, concerning a matter in which these parties share a common interest. You state the communications were made for the purpose of facilitating the rendition of professional legal advice pertaining to issues in which the parties share a common interest. You further state the communications were intended to be confidential and that the confidentiality of the communications has been maintained. Upon review, however, we find you have failed to demonstrate how the submitted handwritten notes consist of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Thus, except as we have marked otherwise, the authority may generally withhold the information you have labeled under section 552.107 of the Government Code. We note some of the individual e-mails contained in the submitted e-mail strings consist of communications with non-privileged parties. We also note information shared with or seen by non-privileged parties is attached to a portion of the privileged e-mails and documents. To the extent those non-privileged e-mails and attachments, which we have marked, exist separate and apart from the submitted e-mail chains or the submitted e-mails and documents to which they are attached, we conclude these e-mail strings and attachments may not be withheld under section 552.107(1) of the Government Code. Accordingly, we will address the remaining arguments against the disclosure of this information as well as the remaining information.

You assert portions of the remaining information are excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state the information at issue was prepared and developed by the authority's attorneys and attorney's representatives in anticipation of litigation of potential condemnation proceedings and reveals their mental processes, conclusions, and legal theories. Upon review, however, some of this information has been provided to non-privileged parties. Therefore, because these parties have had access to this information, the work product privilege under section 552.111 has been waived. Additionally, we find you have failed to demonstrate a portion of the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, except as we have indicated, the authority may generally withhold the remaining information you have marked under the work product privilege of section 552.111. We note, however, some of the individual e-mails contained in the remaining e-mail strings consist of communications with non-privileged parties. We also note information shared with or seen by non-privileged parties are attached to some of the e-mails and documents at issue. Thus, to the extent this information, which we have marked, exists separate and apart from the e-mail chains and the documents at issue, we conclude these e-mails and attachments may not be withheld on the basis of the attorney work product privilege under section 552.111 of the Government Code. Therefore, we will address the remaining arguments against the disclosure of this information as well as the remaining information.

You also argue portions of the remaining information are excepted from disclosure under the deliberative privilege process encompassed by section 552.111 of the Government Code, which 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 exception 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, 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* ORD 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 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).

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 the information at issue represents the advice, opinions, and recommendations of authority employees, the authority's outside counsel, and representatives of agencies that share a privity of interest and common deliberative process with the authority with respect to the subject matter of the communications. Upon review, however, the remaining information at issue 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. Further, we find a portion of the remaining information at issue was communicated with non-privileged parties, and you have failed to demonstrate how the authority shares a privity of interest or common deliberative process with these individuals. Accordingly, the authority may not withhold the remainder of the information it seeks to withhold under the deliberative process privilege of section 552.111.

Faulkner claims some of the remaining information is excepted from public disclosure under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note that section 552.105 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As the authority does not raise section 552.105, we find that this section does not apply to the submitted information. *See* ORD 564 (governmental body may waive statutory predecessor to section 552.105). Therefore, the authority may not withhold any of the information at issue pursuant to section 552.105 of the Government Code.

Faulker also raises section 552.110 of the Government Code for portions of the remaining responsive information. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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 Supreme Court of Texas 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 [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). 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.⁵ RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument 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). We 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

⁵The 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.

business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3.

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* Open Records Decision No. 661 at 5-6 (1999).

Having considered the submitted arguments, we conclude Faulkner has failed to demonstrate that any portion of its information constitutes a trade secret. Thus, the authority may not withhold any portion of the remaining information under section 552.110(a) of the Government Code. We also find that Faulkner has failed to provide specific factual evidence demonstrating that release of any of its information would result in substantial competitive harm to its interests. *See* ORD Nos. 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, we determine that no portion of the information at issue is excepted from disclosure under section 552.110(b) of the Government Code.

We note that some of the non-privileged e-mails and documents contain information subject to sections 552.130, 552.136, and 552.137 of the Government Code.⁶ Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state. *See* Gov’t Code § 552.130(a)(1). Accordingly, the authority must withhold the Texas driver’s license information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked insurance policy numbers that the authority must withhold under section 552.136 of the Government Code.

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Thus, unless the authority receives consent for release, the authority must withhold the e-mail addresses we have marked pursuant to section 552.137.⁷ *See id.* § 552.137(b).

In summary, except as we have marked otherwise, the authority may withhold the information you have labeled under section 552.107 of the Government Code. To the extent the non-privileged e-mails and the information we have marked exist separate and apart from the submitted e-mail chains or the submitted e-mails and documents to which they are attached, these e-mail strings and attachments may not be withheld under section 552.107(1). Except as we have indicated, the authority may withhold the remaining information you have marked under the work product privilege of section 552.111. However, to the extent the information we have marked exists separate and apart from the e-mail chains and the documents at issue, these e-mails and attachments may not be withheld on the basis of the attorney work product privilege under section 552.111. From the non-privileged e-mails and documents, the authority must withhold: (1) the Texas driver’s license information we have marked under section 552.130 of the Government Code; (2) the insurance policy numbers we have marked under section 552.136 of the Government Code; and (3) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the authority received consent for their release.⁸ The remaining information must be released.⁹

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,

⁷We note the remaining information contains the requestor’s personal e-mail address. The requestor has a right to his own e-mail address under section 552.137(b) of the Government Code. *See Gov’t § Code 552.137.*

⁸We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver’s license number, an insurance policy number, and an e-mail address of a member of the public under sections 552.130, 552.136, and 552.137 of the Government Code, respectively, without the necessity of requesting an attorney general decision.

⁹We note the remaining information includes a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *See Gov’t Code § 552.147.*

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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 365151

Enc. Submitted documents

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