



ATTORNEY GENERAL OF TEXAS
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April 22, 2010

Mr. James G. Nolan
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Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2010-05706

Dear Mr. Nolan:

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# 377473 (CPA# 6161784149).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for all responses to a specified request for proposal ("RFP"), all internal documents relating to this RFP, all communications with other governmental bodies regarding this RFP, and all other documents relating to this RFP. You state you will release some information to the requestor. You state you will redact social security numbers pursuant to section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. You also state the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified Advantage Travel Management ("Advantage"); the Alamo Travel Group, L.P. ("Alamo"); Carlson Wagonlit Travel ("CWT"); National Travel Systems ("National"); and Sun Travel, Inc. ("Sun") of the request and of each company's right to submit arguments to this office as to why its information should not be released. *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 third party to raise and

¹Section 552.147(b) 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.

explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Alamo, CWT, and Sun. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of representative samples.²

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the comptroller received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the comptroller is not required to release that information in response to the request.

Next, we note 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Advantage and National have not submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Accordingly, none of the information pertaining to Advantage or National may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret).

Next, we address the arguments submitted by Alamo, CWT, and Sun against disclosure of their information. Alamo asserts its information may not be disclosed because it was marked proprietary and was submitted with the understanding and expectation it would not be subject to public release. However, 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 an agreement or contract, overrule or repeal provisions of the Act. 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 the information

²We assume that the “representative samples” of records submitted to this office are 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.

falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Alamo also raises section 552.104 of the Government Code. Because section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties, we will not consider Alamo's claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991).

Alamo and CWT raise section 552.110 of the Government Code for portions of their information. Sun generally objects to release of its information other than its proposed pricing; thus, we understand Sun to assert its remaining information is excepted from disclosure under section 552.110. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. 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." 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* 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

³ 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]

private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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) excepts from disclosure "[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). 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CWT generally raises section 552.110 for its information, and Sun generally objects to release of its information other than its proposed pricing. Aside from these general assertions, CWT and Sun have not submitted any arguments specifically explaining how any portion of the information they seek to withhold meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Consequently, the comptroller may not withhold any portion of CWT's or Sun's information under section 552.110(a). Furthermore, CWT and Sun have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information they seek to withhold would cause them substantial competitive harm. *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). Therefore, the comptroller may not withhold any portion of CWT's or Sun's information under section 552.110(b).

Alamo asserts portions of its information constitute trade secrets. After reviewing Alamo's arguments and the information at issue, we conclude Alamo has established some of its

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).

information meets the definition of a trade secret, and it has demonstrated the necessary factors to establish a trade secret claim for this information. Thus, the comptroller must withhold the information we have marked under section 552.110(a) of the Government Code. However, Alamo has not demonstrated that any of its remaining information constitutes a trade secret, and the comptroller may not withhold it on that basis.

Alamo also argues that release of portions of its remaining information would cause the company substantial competitive harm. Upon review of its arguments and the information at issue, we find Alamo has established some of its remaining information constitutes commercial or financial information, the release of which would cause it substantial competitive injury. Accordingly, the comptroller must withhold the information we have marked under section 552.110(b) of the Government Code. However, Alamo has provided no specific factual or evidentiary showing that the release of its remaining information would result in substantial competitive injury to its company. *See Open Records Decision Nos. 661, 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 is too speculative), 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). Therefore, the comptroller may not withhold any of Alamo's remaining information under section 552.110(b).

CWT also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)–(b). Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” 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.” *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)–(b); ORD 552, 661. Therefore, because we have already determined that section 552.110 of the Government Code is not applicable to any of CWT’s information, the comptroller may not withhold any of CWT’s information under section 552.131(a) of the Government Code.

Section 552.131(b) protects information relating to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See Gov’t Code* § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not third parties. Therefore, because the comptroller does not claim this exception, none of CWT’s information may be withheld under section 552.131(b) of the Government Code.

Next, we address the comptroller’s arguments against disclosure. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos.* 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find portions of the submitted information are highly intimate or embarrassing and not of legitimate public interest. Accordingly, the comptroller must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing and of no legitimate public interest, and the comptroller may not withhold it on this basis.

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 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).

You state the submitted e-mails are communications between the comptroller’s general counsel and assistant general counsel and the comptroller’s representatives that were made in furtherance of the rendition of legal services to the comptroller. You further state these communications were intended to be confidential and the confidentiality of these e-mails has been maintained. Based on your representations and our review, we conclude the comptroller may generally withhold the submitted e-mails under section 552.107 of the Government Code. We note, however, one of the individual e-mails contained in a submitted e-mail string you seek to withhold under section 552.107 consists of a communication with a non-privileged party. We have marked this non-privileged e-mail. To the extent this non-privileged e-mail exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107. Accordingly, with the exception of the marked non-privileged e-mail that exists separate and apart from the otherwise privileged e-mail string, the comptroller may withhold the submitted e-mails under section 552.107 of the Government Code.

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 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 ORD 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. The 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). Moreover, 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 also has 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 recommendations 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. You state portions of the remaining information, which you have marked, consist of drafts of documents. Therefore, provided the submitted draft documents will be released to the public in their final form, the comptroller may withhold them under section 552.111 of the Government Code. However, we find a portion of the remaining information you have marked does not consist of advice, opinion, or recommendations relating to the policymaking processes of the comptroller. As you raise no other exceptions against its disclosure, this information, which we have marked, must be released.

You contend certain e-mail addresses in CWT's information are excepted under section 552.137 of the Government Code, which provides in relevant part:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

...

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses you seek to withhold were provided to the comptroller by CWT in response to a request for proposals. *See id.* § 552.137(c)(3). Thus, the comptroller may not withhold any of the e-mail addresses at issue under section 552.137. *See id.* § 552.137(c).

Finally, we note some of the submitted 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. 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, the comptroller must withhold the information we have marked under section 552.110 of the Government Code. The comptroller must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The comptroller may withhold the submitted e-mails under section 552.107 of the Government Code, with the exception of the marked non-privileged e-mail that exists separate and apart from the otherwise privileged e-mail string. The comptroller may withhold the draft documents under section 552.111 of the Government Code, provided they will be released to the public in their final form. The remaining information must be released, but any information that is protected by copyright may only 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, 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,



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Open Records Division

MTH/rl

Ref: ID# 377473

Enc. Submitted documents

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