



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2010

Mr. Daniel Bradford
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2010-07755

Dear Mr. Bradford:

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# 381470.

The Travis County Commissioner's Court (the "county") received two requests from the same requestor for "backup material" and due diligence assessment information pertaining to a specified proposal and office building. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ In addition, you state some of the submitted information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, you have notified Development 2000 ("D2000") of the request and of its right to submit comments to this office as to why the requested information should not be released to the requestor. *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 explain applicability of exception to disclosure under

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 102 (2002), 575 at 1-2 (1990). Further, although you raise Texas Rule of Evidence 503, in this instance, this information is properly addressed under section 552.107 of the Government Code.

the Act in certain circumstances). We have received comments from an attorney for D2000. We have considered the submitted arguments and reviewed the submitted information.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. The county and D2000 both raise section 552.101 in conjunction with sections 418.181 and 418.182 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.181 provides as follows:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. §§ 418.181; *see generally id.* § 421.001 (defining critical infrastructure to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation"). Section 418.182 provides as follows:

(a) Except as provided by subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. §§ 418.182(a). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

²We assume that the representative sample 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.

In this instance, the information at issue consists of security and structural due diligence reports and D2000's proposal documents pertaining to a building the county intends to purchase. We understand you to assert that the building at issue constitutes critical infrastructure and that the information at issue identifies the technical details of particular vulnerabilities of this critical infrastructure to an act of terrorism. *See id.* § 421.001. Upon review of the arguments and the information at issue, we find the county has demonstrated that some of the information at issue, which we have marked, identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. The county must withhold this information under section 552.101 in conjunction with section 418.181 of the Government Code.³ However, we conclude that the county and D2000 have not demonstrated that the remaining information reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See id.* § 418.181. Furthermore, we find the county and D2000 have failed to demonstrate that any of the remaining information is related to the specifications, operating procedures, or location of a security system for the purposes of section 418.182 of the Government Code. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with section 418.181 or section 418.182.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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 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

³As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

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 explain that some of the submitted information consists of a communication between or among lawyers or lawyer representatives and clients and client representatives of the county, made for the purpose of facilitating the rendition of professional legal services. You also inform us the communications were intended to be confidential and that confidentiality has been maintained. Based on your arguments and our review of this information, we agree that the information you have marked consists of privileged attorney-client communications that the county may withhold under section 552.107(1) of the Government Code.

D2000 raises section 552.101 for portions of its information. We note D2000’s information contains information protected by common-law privacy. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992), 545 (1990)*. We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). We have marked information that must be withheld under section 552.101 in conjunction with common-law privacy. However, the remaining information pertains to business entities. We find D2000 has failed to establish any of the remaining information at issue is highly intimate or embarrassing and

not of legitimate public concern. Accordingly, the county may not withhold any of D2000's remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. Further, D2000 has failed to direct our attention to any law under which any of the information at issue is considered to be confidential for purposes of section 552.101. Therefore, none of the D2000's remaining information may be withheld under section 552.101 of the Government Code.

D2000 also asserts its information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the county, not the proprietary interests of private parties such as D2000. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the county does not raise section 552.104 as an exception to disclosure. Therefore, the county may not withhold any of the submitted information under section 552.104 of the Government Code.

D2000 argues that portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 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* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . A trade secret is a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ 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).

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 (1999) at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find D2000 has made a *prima facie* case that some of its client information is protected as trade secret information. We note, however, D2000 publishes the identities of some of its clients on its website. In light of D2000’s own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, D2000 has failed to demonstrate that any portion of its remaining information constitutes a trade secret. Accordingly, the county must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining information is excepted from disclosure under section 552.110(a).

⁴The Restatement of Torts lists the following six factors 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 other 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).

We also understand D2000 to argue its customer information is subject to section 552.110(b), but as previously stated, D2000 has published the identities of some of its customers on its website. Thus, D2000 has failed to demonstrate that release of these customers' information or any of its remaining information would cause it substantial competitive injury. *See* Open Records Decision 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), 509 at 5 (1988) (because 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, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Finally, we note that 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. 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 county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: 1) section 418.181 of the Government Code and 2) common-law privacy. The county may withhold the information it has marked under section 552.107 of the Government Code. The county must withhold the information we have marked under section 552.110 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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 381470

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

cc: Mr. Brian T. Thompson
McGinnes Lochrdige & Kilgore
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)