



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2010

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2010-12298

Dear Ms. Soucy:

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# 390281 (Comptroller ID Nos. 6384987736 and 6380700490).

The Comptroller of Public Accounts (the "comptroller") received two requests for documents pertaining to named individuals, named entities, and Formula One racing. You state the comptroller will provide some of the requested information to the requestors. You claim some of the submitted documents are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of the submitted proposal information may implicate the proprietary interests of Full Throttle Productions, L.P. ("Full Throttle"). Accordingly, you state, and provide documentation showing, the comptroller notified Full Throttle of the request and of its right to submit arguments to this office as to why the submitted proposal information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Full Throttle. We have considered the submitted arguments and reviewed the submitted information, some of which is a representative sample.¹

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

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 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 lawyers representing another party in a pending action concerning a matter of common interest therein. 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 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 draft impact plan and some of the submitted e-mails and attachments are communications between comptroller attorneys and comptroller staff that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the documents you seek to

withhold. Thus, the comptroller may withhold this information, which we have marked, under section 552.107 of the Government Code.²

You claim the remaining e-mails and attachments are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. 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 section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. Likewise, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You argue the remaining e-mails and attachments reflect communications among comptroller officials regarding the economic impact of a proposed business venture on a specific location within the state. Based on your arguments, we find you have sufficiently demonstrated how the information contained in the remaining e-mails and attachments pertains to the comptroller's policymaking processes. You contend the information at issue consists of the advice, recommendations, and opinions of comptroller officials regarding the policy issues. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to portions of the remaining e-mails and attachments at issue. Accordingly, the comptroller may withhold the information we have marked under section 552.111 of the Government Code. You have failed to demonstrate, however, how the remaining information in the e-mails and attachments reveals advice, recommendations, and opinions regarding policymaking issues. Consequently, this remaining information may not be withheld under section 552.111 of the Government Code. As you have claimed no other exceptions to disclosure for the remaining information in the e-mails and attachments, it must be released.

Full Throttle asserts its submitted proposal information is confidential because it specifically labeled the information as confidential prior to submitting the information to the comptroller. Information is not confidential under the Act, however, simply because the party that submits

²As our ruling for this information is dispositive, we need not address your remaining argument against disclosure of this information.

the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 section 552.110 of the Government Code). Consequently, unless Full Throttle’s proposal information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Full Throttle claims its information is excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (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.” 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 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 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the

definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.³ Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6 (1999).

Full Throttle claims its proposal information constitutes a trade secret under section 552.110(a). Full Throttle argues its methodology for compiling facts and figures and analyzing that information to choose optimum locations for its events is a process it continually uses in its business. The submitted information, however, does not include or reveal details of that methodology or how the compiled information is analyzed. Instead, the information consists of statistics regarding previous events, estimated figures for the project at issue, marketing data, and illustrations of the proposed facility for the project at issue. Thus, we find Full Throttle has failed to demonstrate its information meets the definition of a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (trade secret "is not simply information as to a single or ephemeral event in the conduct of the business"); Open Records Decision Nos. 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), 319 at 3 (1982) (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). Consequently, the comptroller may not withhold any of Full Throttle's information under section 552.110(a) of the Government Code.

Full Throttle also claims its information constitutes commercial information that, if released, would cause it substantial competitive harm. After reviewing the submitted arguments and the information at issue, however, we find Full Throttle has made only general conclusory assertions that release of its information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *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

³The 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 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).

give competitor unfair advantage on future contracts is too speculative), 319 at 3. Therefore, the comptroller may not withhold any of Full Throttle's information under section 552.110(b) of the Government Code.

Full Throttle also claims its information is excepted under section 552.131 of the Government Code, which is applicable to economic development information and provides:

(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 of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6, 552 at 5. As previously stated, Full Throttle has failed to demonstrate any portion of its information meets the definition of a trade secret, and Full Throttle has provided no specific factual or evidentiary showing release of its information would cause the company substantial competitive injury. Consequently, the comptroller may not withhold any of Full Throttle's information under section 552.131(a) of the Government Code.

We note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the comptroller does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of Full Throttle's information is excepted under section 552.131(b) of the Government Code.

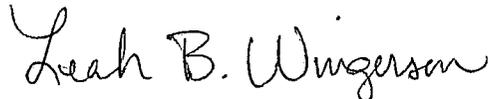
Full Throttle also contends its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with copyright law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Although Full Throttle's information appears to be subject to copyright, we note copyright law does not make information confidential for the purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). 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). Accordingly, Full Throttle's information must be released in accordance with copyright law.

In summary, the comptroller may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The remaining information must be released, but Full Throttle's proposal 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 390281

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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