



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2010

Ms. Linda S. Wiegman
Acting General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-14897

Dear Ms. Wiegman:

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# 395317.

The Texas Health and Human Services Commission (the "commission") received two requests for information pertaining to request for offers number 53700-10-0000073827 for the Pharmacy and Emergency Preparedness Asset Management System, including (1) evaluation and scoring documentation and a list of demonstration attendees; (2) the length of time for each demonstration; (3) notes, evaluations, and names of the executive steering committee; (4) proposals showing the winning bid's satisfaction of all requirements; (5) pricing for the winning bid; (6) details of how the winning vendor will handle installation of software at remote locations; (7) communications between the evaluation team, executive steering committee, members of the Texas Department of State Health Services, and the winning vendor; and (8) documentation from the consultant involved in the selection process.¹ You explain the commission forwarded the requests for information to the Texas Department of State Health Services (the "department") for handling.² You state the department has released some of the requested information. The department states a portion

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

²You state the commission processes certain procurements as the administrative agent of the department, but the department processes open records requests concerning those procurements.

of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Although the department takes no position as to whether the remaining submitted information is excepted under the Act, it states release of the remaining submitted information may implicate the proprietary interests of Upp Technology, Inc. ("Upp"). Accordingly, the department states, and provides documentation showing, it notified Upp of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Upp. We have considered the submitted arguments and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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 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. *See 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 the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The department states the information at issue consists of e-mails and their attachments sent between the department's attorney and the department's staff, employees in their capacities as clients, and a contractor who shares a common interest with the department. The department also states these communications were made for the purpose of soliciting or providing legal advice to the department, and were intended to be, and have remained, confidential. Based on your representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to information at issue. Accordingly, the department may withhold the information at issue, which you have marked, under section 552.107 of the Government Code.

We note Upp argues against disclosure of portions of its proposal that were not submitted by the department.³ This ruling does not address information related to Upp beyond what the department submitted to this office for review, and is limited to the information the department submitted as responsive to the instant request. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Upp argues its submitted information should be withheld from disclosure because the information was labeled "confidential" when the bid was submitted. 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 falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Upp raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." We note section 552.104 protects the interests of governmental bodies, not third parties. See Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the department does not argue section 552.104 is applicable, we will not consider Upp's claim under this section. See ORD 592 (section 552.104 may be waived by governmental body). Therefore, the department may not withhold any of the remaining information under section 552.104 of the Government Code.

³We note the department states, pursuant to department policy pertaining to an awarded contract in which documents are not clearly marked confidential or proprietary, it has released most of Upp's proposal to the requestor.

Upp further argues its submitted information is 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, 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 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* *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the

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).

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 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Upp asserts its submitted information constitutes “Very Confidential Trade Secrets” under section 552.110(a) of the Government Code. Upon review, we conclude Upp has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Upp has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, none of Upp’s information may be withheld under section 552.110(a).

Upp further argues the remaining information contains commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Upp has made only conclusory allegations that the release of any of its information would result in substantial harm to its competitive position. *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 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). Accordingly, none of Upp’s information may be withheld under section 552.110(b).

In summary, the department may withhold the information it has marked under section 552.107 of the Government Code. The remaining submitted information must be released.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tp

Ref: ID# 395317

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)