



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2010

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P. O. Box 368
Houston, Texas 77001-0368

OR2010-17427

Dear Ms. Chang:

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# 400343.

The City of Houston (the "city") received a request for all responses to the real estate portion of a specified request for qualifications ("RFQ") and a list of all law firms that responded to the RFQ.¹ The city takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, that you notified the interested third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received arguments from Lewis Barnes, McGlinchey Stafford, P.L.L.C.

¹The city sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

(“McGlinchey”), and Wayman L. Prince (“Prince”).² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from Lewis Barnes, McGlinchey, and Prince.³ We, thus, have no basis for concluding that any portion of the submitted information constitutes the other law firms’ proprietary information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the submitted information based on the proprietary interests of the non-briefing third parties.

We now address McGlinchey’s contention that its information is not subject to the Act. The Act is applicable to “public information.” *See* Gov’t Code § 552.021. Section 552.002 of the Act provides that “public information” consists of “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of

²Although Lewis Barnes raises section 552.022 of the Government Code as an exception to disclosure, we note that provision is not an exception to disclosure. Rather, section 552.022 lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov’t Code § 552.022. Additionally, although Lewis Barnes raises section 552.101 of the Government Code in conjunction with rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and rule 503 of the Texas Rules of Evidence, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). Further, we note that the proper exception for Lewis Barnes to raise when asserting the attorney-client privilege for the information at issue is section 552.107 of the Government Code. *See id.* at 6. Finally, although Lewis Barnes raises section 552.158 of the Government Code, it has not provided any arguments regarding the applicability of that exception. Since Lewis Barnes has not submitted arguments concerning section 552.158, we assume that this law firm no longer urges it. *See* Gov’t Code §§ 552.301(b), (e), .302.

³The remaining third parties you have notified are as follows: Adams & Reese LLP; Andrews & Kurth LLP; Ann M. Levy PC; Baker Hostetler; Barnes & Turner; Bickerstaff, Heath, Delgado & Acosta LLP; Brown McCarroll; The Chevalier Law Firm PLLC; Coats Rose PC; Cordray, Wagner, & Schneller; Edgardo E. Colon PC; Gilman & Gilman PC; Gordon, Arata, McCollam, Duplantis & Eagan LLP; Greenberg Traurig LLP; Hoover Slovacek LLP; Ireland Hargis PLLC; Jackson, Sjoberg, McCarthy & Wilson LLP; Knight & Partners; Levin & Atwood LLP; Liles Parker PLLC; Munsch, Hardt, Kopf & Harr PC; Nathan, Sommers, & Jacobs PC; Olson & Olson LLP; Porter & Hedges LLP; Randle Law Office Ltd. LLP; Roberts Markel PC; Rogers, Morris & Grover LLP; Ross, Banks, May, Cron & Cavin PC; Sechrist Duckers LLP; Shannon, Martin, Finkelstein & Alvarado PC; Singleton Cooksey LLP; Strasburger & Price LLP; Thompson & Horton LLP; Thompson & Knight; Vinson & Elkins LLP; Weycer, Kaplan, Pulaski & Zuber P.C.; Winstead PC; and Zimmerman, Axelrad, Meyer, Stern & Wise PC.

official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). McGlinchey argues that its information is not subject to the Act because McGlinchey itself is not a governmental body. However, we note that McGlinchey’s information is in the possession of the city, which is a governmental body as defined by section 552.003, and was collected, assembled, or maintained in connection with the transaction of the city’s official business. Therefore, we conclude that McGlinchey’s information is subject to the Act and must be released, unless the city or McGlinchey demonstrates that the information falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302. Thus, we will consider McGlinchey’s arguments against disclosure.

Prince raises section 552.101 of the Government Code, but has not directed our attention to any law, nor are we aware of any, under which the information it seeks to withhold is considered to be confidential for the purposes of section 552.101.⁴ *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). We, therefore, conclude that the city may not withhold any of Prince’s information under section 552.101 of the Government Code.

McGlinchey raises section 552.101 of the Government Code in conjunction with common-law privacy. Common-law privacy 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. Upon review, we find McGlinchey’s proposal does not contain information that is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city may not withhold any of McGlinchey’s information under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, McGlinchey raises section 552.103 of the Government Code, the litigation exception, for its information. Additionally, Lewis Barnes and McGlinchey both assert their information is excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. Further, we understand both Lewis Barnes and McGlinchey to raise the attorney-client privilege under section 552.107 of the Government Code for portions of their information at issue. We note that sections 552.103,

⁴Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.

552.104, and 552.107 protect the interests of governmental bodies, as distinguished from exceptions which are intended to protect the interests of third parties. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103), Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107), 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not raise section 552.103, section 552.104, or section 552.107, we will not consider Lewis Barnes and McGlinchey's arguments under these exceptions. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76, ORDs 630, 592 (section 552.104 may be waived by governmental body). Therefore, the city may not withhold any of Lewis Barnes's or McGlinchey's information under section 552.103, section 552.104, or section 552.107 of the Government Code.

Next, Lewis Barnes, McGlinchey, and Prince all raise section 552.110 of the Government Code for their respective information. 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.⁵ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a 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).

Having reviewed the arguments of Lewis Barnes, McGlinchey, and Prince, we find Lewis Barnes and Prince have demonstrated that each companies' client information constitutes trade secrets. We have marked the client information in Lewis Barnes's and Prince's information that the city must withhold under section 552.110(a) of the Government Code. However, we find that Lewis Barnes, McGlinchey, and Prince have failed to demonstrate how any of the remaining information at issue meets the definition of a trade secret, nor have Lewis Barnes, McGlinchey, and Prince demonstrated the necessary factors to establish a trade secret claim for this information. Thus, the city may not withhold any of the remaining information under section 552.110(a). *See* ORD 402; RESTATEMENT OF TORTS § 757 cmt. b.

We also understand Lewis Barnes and Prince to raise section 552.110(b) for their respective information. Upon review, we find Prince has established its pricing information constitutes commercial or financial information, the release of which would cause the law firm substantial competitive harm. Thus, the city must withhold the pricing information we have marked in Prince's information under section 552.110(b). However, we find Lewis Barnes, and Prince have made only conclusory allegations that the release of their remaining information would result in substantial damage to the law firms' competitive positions.

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 (1980).

Thus, Lewis Barnes and Prince have not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of their remaining information. *See* Open Records Decision Nos. 661 at 5-6, 509 at 5 (1988). Accordingly, the city may not withhold any of their remaining information under section 552.110(b).

Lewis Barnes also raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. *See* Gov't Code § 552.113; *see generally* Open Records Decision No. 627 (1994). Because Lewis Barnes has not demonstrated this exception is applicable to any of its information, the city may not withhold any of Lewis Barnes's information under section 552.113 of the Government Code.

We note that the remaining information contains an insurance policy number. Section 552.136 of the Government Code provides 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."⁶ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, the insurance policy number we have marked must be withheld under section 552.136.⁷

Finally, we note some of the remaining 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the city must withhold the information we have marked under section 552.110 of the Government Code and section 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.

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

⁷We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/tp

Ref: ID# 400343

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Wayman L. Prince
Attorney at Law
9111 Katy Freeway, Suite 301-302
Houston, Texas 77024
(w/o enclosures)

Mr. Charles L. Adams
McGlinchey Stafford, PLLC
1001 McKinney, Suite 1500
Houston, Texas 77002-6420
(w/o enclosures)

Ms. Shannon Ross
Lewis Barnes
4801 Woodway Drive, Suite 300E
Houston, Texas 77056
(w/o enclosures)

Mr. Chris Derden
Adams & Reese, L.L.P.
1221 McKinney, Suite 4400
Houston, Texas 77010
(w/o enclosures)

Mr. Mark Arnold
Andrews & Kurth, L.L.P.
600 Travis, Suite 4200
Houston, Texas 77002
(w/o enclosures)

Mr. Stuart Levin
Levin & Atwood, L.L.P.
20501 Katy Freeway, Suite 217
Katy, Texas 77450
(w/o enclosures)

Mr. Barry Barnes
Barnes & Turner
440 Louisiana, 1880 Lyric Centre
Houston, Texas 77002
(w/o enclosures)

Ms. Antoinette M. Jackson
Coats Rose
Three Greenway Plaza, Suite 2000
Houston, Texas 77046
(w/o enclosures)

Mr. Edgardo E. Colón
Edgardo E. Colón, P.C.
1221 McKinney, Suite 4400
Houston, Texas 77010
(w/o enclosures)

Mr. Jeffrey L. Gilman
Gilman & Gilman, P.C.
710 North Post Oak Road, Suite 400
Houston, Texas 77024
(w/o enclosures)

Mr. Joseph O. Slovacek
Hoover Slovacek, L.L.P.
5847 San Felipe, Suite 2200
Houston, Texas 77057
(w/o enclosures)

Ms. Ann M. Levy
Ann M. Levy, P.C.
11622 Green Oaks
Houston, Texas 77024
(w/o enclosures)

Mr. Gary Alletag
Baker Hostetler
1000 Louisiana, Suite 2000
Houston, Texas 77002
(w/o enclosures)

Ms. Debra Levy Gilbreath
Brown McCaroll
1111 Bagby, 47th Floor
Houston, Texas 77002
(w/o enclosures)

Mr. Felix Chevalier
Chevalier Law Firm
1330 Post Oak Boulevard, Suite 1600
Houston, Texas 77056
(w/o enclosures)

Mr. Howard F. Cordray
Cordray, Wagner & Schneller
3306 Sul Ross
Houston, Texas 77098
(w/o enclosures)

Mr. Roland Garcia
Greenberg Traurig, L.L.P.
1000 Louisiana, Suite 1700
Houston, Texas 77002
(w/o enclosures)

Mr. Bradford W. Irelan
Irelan Hargis, P.L.L.C.
440 Louisiana, Suite 1800
Houston, Texas 77002
(w/o enclosures)

Mr. Barney L. Knight
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752
(w/o enclosures)

Mr. Steven A. Harr
Munsch, Hardt, Kopf, & Harr, P.C.
700 Louisiana, Suite 4600
Houston, Texas 77002
(w/o enclosures)

Mr. Brian J. Begle
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019
(w/o enclosures)

Mr. J. Grady Randle
Randle Law Office, L.L.P.
820 Gessner, Suite 1570
Houston, Texas 77024
(w/o enclosures)

Mr. Richard A. Morris
Rogers, Morris & Grover, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057
(w/o enclosures)

Ms. Terrie L. Sechrist
Sechrist Duckers, L.L.P.
770 South Post Oak Lane, Suite 410
Houston, Texas 77056
(w/o enclosures)

Mr. Robert H. Singleton, Jr.
Singleton Cooksey, L.L.P.
6363 Woodway, Suite 610
Houston, Texas 77057
(w/o enclosures)

Mr. Leonard Schneider
Liles Parker
525 East Sam Houston Pkwy N. Suite 415
Houston, Texas 77060
(w/o enclosures)

Mr. Marvin D. Nathan
Nathan, Sommers, & Jacobs, P.C.
2800 Post Oak Boulevard, #6100
Houston, Texas 77056
(w/o enclosures)

Ms. Allison J. Snyder
Porter & Hedges, L.L.P.
1000 Main Street, 36th Floor
Houston, Texas 77002
(w/o enclosures)

Mr. Marc D. Markel
Roberts Markel, P.C.
2800 Post Oak Boulevard, #5700
Houston, Texas 77056
(w/o enclosures)

Mr. Jim D. Hamilton
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056
(w/o enclosures)

Ms. Betsy Kamin
Strasburger & Price, L.L.P.
1401 McKinney Street, Suite 2200
Houston, Texas 77010
(w/o enclosures)

Mr. Phillip D. Fraissinet
Thompson & Horton, L.L.P.
711 Louisiana, Suite 2100
Houston, Texas 77002
(w/o enclosures)

Mr. Bryan P. Neal
Thompson & Knight
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(w/o enclosures)

Mr. Barron F. Wallace
Vinson & Elkins L.L.P.
1001 Fannin Street, Suite 2500
Houston, Texas 77002
(w/o enclosures)

Mr. Albert S. Weycer
Weycer, Kaplan, Pulaski & Zuber, P.C.
11 Greenway Plaza, Suite 1400
Houston, Texas 77046
(w/o enclosures)

Mr. Denis C. Braham
Winstead, P.C.
600 Travis Street, Suite 1100
Houston, Texas 77002
(w/o enclosures)

Mr. Brian W. Zimmerman
Zimmerman, Axelrad, Meyer, Stern
& Wise, P.C.
3040 Post Oak Boulevard, Suite 1300
Houston, Texas 77056
(w/o enclosures)

Ms. Denise V. Cheney
Bickerstaff, Heath, Delgado & Acosta,
L.L.P.
3711 S. MoPac Expwy, Bldg. 1, Suite 300
Austin, Texas 78746
(w/o enclosures)

Mr. J. Lanier Yeates
Gordon, Arata, McCollam, Duplantis
& Eagan, L.L.P.
777 South Post Oak, Suite 1300
Houston, Texas 77056
(w/o enclosures)

Mr. David E. Jackson
Jackson, Sjoberg, McCarthy & Wilson,
L.L.P.
711 West 7th Street
Austin, Texas 78701
(w/o enclosures)

Ms. Nancy F. Martin
Shannon, Martin, Finkelstein & Alvarado, P.C.
1001 McKinney, Suite 1100
Houston, Texas 77002
(w/o enclosures)