



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

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

OR2011-08420

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# 421139 (Comptroller ID# 7113523189).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for the bid proposals, any joint proposals, and the BAFO submitted by P.D. Morrison Enterprises, Inc. ("PDME") and Office Depot in response to the 615-A1 statewide contract; correspondence between PDME, Office Depot, the comptroller, and the Office of the Attorney General pertaining to the RFP and the awarding of the contract; and any correspondence protesting the award. You indicate you have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You state you have released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Although the comptroller takes no position on the matter, you state that release of the remaining submitted information may implicate the proprietary interests of PDME and Office Depot. Accordingly, you inform us, and provide documentation showing, that the comptroller notified PDME and Office Depot of the request and of their right to submit arguments to this office as to why the submitted 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 comments from representatives of PDME and Office

¹Section 552.147(b) of the Government Code 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. Gov't Code § 552.147(b).

Depot. We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.²

Initially, you inform us that a portion of the requested third party information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-06918A (2011). In that ruling, we found the comptroller must withhold Office Depot's pricing information under section 552.110(b) of the Government Code and must release the remaining information at issue. We conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the comptroller must continue to rely on that ruling as a previous determination and withhold or release the same information in accordance with Open Records Letter No. 2011-06918A. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The comptroller contends the information it has marked under section 552.107(1) of the Government Code is excepted under that section, which 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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

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.

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 information you have marked under section 552.107 constitutes e-mail communications amongst comptroller attorneys and employees that were made for the purpose of providing legal services to the comptroller. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the comptroller may withhold the information you marked under section 552.107(1) of the Government Code.³

Next, we note some of the information that PDME and Office Depot argue should be excepted, such as unit and bottom-line pricing, was not submitted by the comptroller for our review. With the exception of the information subject to the previous determination, this ruling does not address information that was not submitted by the comptroller and is limited to the information submitted as responsive by the comptroller. *See Gov’t Code § 552.301(e)(1)(D)* (governmental body requesting decision from Attorney General must submit copy of specific information requested).

PDME and Office Depot contend that their proposals may not be disclosed because the information at issue was marked confidential. 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.

PDME and Office Depot raise section 552.104 of the Government Code. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties.

³As our ruling is dispositive, we need not address your argument under section 552.111 of the Government Code for a portion of the submitted information.

See Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). As Office Depot acknowledges, the comptroller does not raise section 552.104 as an exception to disclosure. Therefore, the comptroller may not withhold any of the information at issue pursuant to section 552.104. See ORD 592 (governmental body may waive section 552.104).

PMDE and Office Depot claim the submitted information at issue is excepted under section 552.110 of the Government Code, which 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. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also Open Records Decision No. 552 (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

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).

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. *See* 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 5-6 (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).

Having considered their submitted arguments, we find that PDME and Office Depot have failed to demonstrate that any of their information at issue meets the definition of a trade secret, nor have PDME and Office Depot demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 319 at 3 (information relating to organization and personnel, market studies, and qualifications and experience are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of PDME’s or Office Depot’s information at issue may be withheld under section 552.110(a) of the Government Code. In addition, we find that PDME and Office Depot have made only conclusory allegations that the release of the information each company seeks to withhold would result in substantial damage to their competitive positions. Thus, PDME and Office Depot have not demonstrated that substantial competitive injury would result from the release of any of the information at issue. *See* Open Records Decision Nos. 661, 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. Accordingly, none of PDME’s or Office Depot’s information at issue may be withheld under section 552.110(b).

In summary, the comptroller must continue to rely on Open Records Letter No. 2011-06918A as a previous determination and withhold or release the information subject to that ruling in accordance therewith. The comptroller may withhold the information you have marked under section 552.107 of the Government Code. The remaining information at issue 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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/em

Ref: ID# 421139

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Kurt J. Hamrock
McKenna Long & Aldridge, LLP
Attorneys for Office Depot
1900 K Street, Northwest
Washington, D.C. 20006-1108
(w/o enclosures)

Ms. Bonnie Carothers
National Account Manager
P.D. Morrison Enterprises, Inc.
1120 Toro Grande Boulevard, Building 2, Suite 208
Cedar Park, Texas 78613
(w/o enclosures)