



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 9, 2012

Ms. Anne Constantine  
Legal Counsel  
Dallas/Fort Worth International Airport  
P.O. Box 619428  
DFW Airport, Texas 75261-9428

OR2012-05061

Dear Ms. Constantine:

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# 449938.

The Dallas/Fort Worth International Airport Board (the "board") received a request for the top three scoring proposals for three specified concession packages, excepting those from the requestor's company, and the scoring sheets used to assess points awarded for the top three proposals in each category. You state you will release some of the requested information. You claim a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Delaware North Travel Hospitality Services ("Delaware North") and the Texas CI, LLC and Corliss Stone-Littles, LLC Joint Venture ("Texas CI"). Accordingly, you state, and provide documentation showing, you notified Delaware North and Texas CI of the board's receipt of the request for information 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); *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 representatives of Delaware North and Texas CI. We

have considered the claimed exceptions and reviewed the submitted information, a portion of which consists of a representative sample.<sup>1</sup>

Section 552.111 of the Government Code excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *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 that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You indicate the submitted scoring sheets relate to your evaluation of proposed concession packages. You state the submitted score sheets were created by board personnel in a deliberative process. You indicate the documents at issue pertain to policymaking functions of the board. Thus, you state the submitted information consists of advice, opinion, and

---

<sup>1</sup>We 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.

recommendation, the release of which would have a chilling effect on the deliberative process by inhibiting the board's free discussion of policy issues. Based on your representations and our review of the information at issue, we find the board may withhold the submitted score sheets under section 552.111 of the Government Code.

Texas CI seeks to withhold an account number contained on a check. We note, however, the board did not submit this information for our review.<sup>2</sup> This ruling does not address information beyond what the board has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D).

We understand Delaware North to argue its information is confidential because it was marked as "confidential" when submitted to the board. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that 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, through an agreement or contract, overrule or repeal provisions of the Act. *See* 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 at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Delaware North claims portions of its information should be withheld pursuant to the section 552(b)(4) exemption of the federal Freedom of Information Act ("FOIA"). However, in Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by a Texas agency or its political subdivisions. Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). The information at issue in this case is held by the board, a governmental entity of the State of Texas. Accordingly, Delaware North's information may not be withheld pursuant to FOIA.

---

<sup>2</sup>We note section 552.136(c) of the Government Code authorizes a governmental body to redact from the requested information it discloses, without the necessity of requesting a decision from this office, a credit card, debit card, charge card, or access device number. Gov't Code § 552.136(c) (governmental body may redact information described by subsection 552.136(b) from any information the governmental body discloses without necessity of requesting decision from attorney general); *see id.* § 552.136(d) (entitling requestor to appeal governmental body's decision to withhold information pursuant to section 552.136(c) to attorney general); *id.* § 552.136(e) (requiring governmental body that withholds information pursuant to section 552.136(c) to provide notice to requestor).

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 the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found the personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *E.g.*, Open Records Decision Nos. 600 (1992), 545 (1990). However, the doctrine of common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. *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 FCC v. AT&T Inc.*, 131 S.Ct. 1177, 1185 (2011) (“The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.”). Texas CI asserts portions of its information are excepted under common-law privacy. However, upon review, we find none of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the submitted information is not confidential under common-law privacy, and the board may not withhold it under section 552.101 on that ground.

Delaware North claims portions of its submitted information are excepted from disclosure under section 552.104 of the Government Code, which excepts “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). However, this section only protects the interests of a governmental body and not those of private 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). Because section 552.104 does not protect the interests of private parties, and the board does not claim this section applies to the submitted information, the board may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” 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.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas 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 single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . 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) (emphasis added); *see 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 the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> *See Open Records Decision No. 552 at 5* (1990). We cannot conclude that section 552.110(a) is applicable, however, 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

---

<sup>3</sup>The 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 Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

§ 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered Delaware North's arguments under section 552.110(a), we determine that Delaware North has failed to demonstrate that any portion of its information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b; *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3 (1982). Accordingly, the board may not withhold any of the submitted information on the basis of section 552.110(a) of the Government Code.

Delaware North and Texas CI also contend some of their information is excepted from public disclosure under section 552.110(b) of the Government Code. We find Texas CI has established that release of portions of its financial information would cause it substantial competitive injury. Therefore, the board must withhold the financial information, which we have marked, under section 552.110(b) of the Government Code. However, we find that Texas CI has failed to demonstrate that release of any of its remaining information and Delaware North has failed to demonstrate that release of any of its information would result in substantial competitive harm. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the board may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

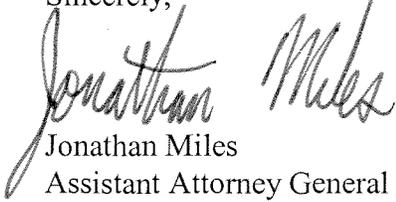
In summary, the board may withhold the information we have marked under section 552.111 of the Government Code. The board must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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](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,

A handwritten signature in cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned above the printed name and title.

Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 449938

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Matthew R. King  
Delaware North Companies Travel Hospitality Services, Inc.  
40 Fountain Plaza  
Buffalo, New York 14202  
(w/o enclosures)

Ms. Maurice Owens, Jr.  
Owens Hervey PLLC  
Bank of America Plaza  
901 Main Street, Suite 3612  
Dallas, Texas 75202  
(w/o enclosures)