



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2012

Ms. Sarah Shirley
Assistant General Counsel
Texas Association of School Boards
P.O. Box 400
Austin, Texas 78767-0400

OR2012-10952

Dear Ms. Shirley:

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# 459057.

The Texas Association of School Boards Energy Cooperative (the "cooperative"), which you represent, received a request for 1) the request for proposal ("RFP") or bid guidelines for the current energy contract; 2) the winning bid package including all associated attachments for provision of electrical service; 3) the current contract with Direct Energy and/or its affiliates, including all associated documents, attachments, appendices, enclosures, and notes; 4) minutes, notes, and correspondence detailing negotiations for the current contract; 5) the effective end date for the current contract with Direct Energy; 6) a list of all school districts currently participating in the agreement with Direct Energy; 7) the total number of electrical meters covered under the agreement by district; 8) the cumulative energy usage for all participating school districts; 9) the ESIID for each meter covered under the agreement; 10) the total energy usage by meter for specified years; 11) the current basic energy cost per KWH per district, including any fees paid to Direct Energy; and 12) the date the next RFP or contract negotiations will be offered. You state you have released the information responsive to items 1, 2, 6, and 12, and some of the information responsive to item 4. You claim portions of the submitted information are exempted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of Direct Energy Business, LLC ("Direct"). Accordingly, you state, and provide documentation showing, you have

notified Direct of the request and its right to submit arguments to this office. *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 Direct. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note you have not submitted information responsive to items 7, 8, 9, 10, or 11. To the extent such information existed and was maintained by the cooperative on the date the cooperative received the request for information, we assume it has been released. If the cooperative has not released such information, it must do so at this time. *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 664 (2000) (if governmental body determines no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address Direct's assertion that the submitted aggregation agreement is not subject to the Act because a governmental body is not a party to the agreement. We note the agreement is between Direct and the Texas Association of School Boards, Inc. ("TASB"), a nonprofit organization that has contracted with the cooperative to administer the cooperative's electricity aggregation program. We further note before TASB entered the agreement with Direct, you inform us the agreement was approved by the cooperative, which you state is an administrative agency of cooperating local governments created under the Texas Interlocal Cooperation Act, Chapter 791 of the Local Government Code. Section 552.002 of the Government Code defines "public information" as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a). TASB's agreement with Direct is maintained by TASB as the custodian of records for the cooperative in connection with the cooperative's official business. It is therefore public information subject to the Act.

Direct also argues the company's information should not be released because it was made confidential under agreements with TASB and cooperative members. However, information subject to the Act is not confidential simply because the parties submitting the information anticipate or request that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, governmental bodies or third-parties

¹We 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.

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 section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

You claim portions of the submitted information are protected by the attorney-client privilege. Section 552.107 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, and lawyer representatives. See TEX. R. EVID. 503(b)(1). 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.*, 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).

You claim the information you have marked is protected by section 552.107(1) of the Government Code. You state the e-mails consist of attorney-client communications that were made between the cooperative, TASB attorneys and employees as in-house counsel and administrator of the cooperative, outside counsel for the cooperative, and consultants for the cooperative. You state these communications were made for the purpose of rendering professional legal services to the cooperative. You state these communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the cooperative may generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, you have marked e-mails from a non-privileged party in these privileged e-mail strings that are separately responsive to the instant request. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they are included, the cooperative may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they are included, the cooperative may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

You seek to withhold portions of the submitted information under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency 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); *see also* Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The 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. *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).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the information you have marked under section 552.111 constitutes communications between the cooperative, TASB attorneys and employees, outside counsel for the cooperative, and consultants for the cooperative relating to policymaking. Further, we note portions of the submitted information consist of draft documents. However, you do not state whether the submitted draft documents, which we have marked, will be released to the public in their final form. Thus, to the extent the marked draft documents will be released to the public in their final form, the cooperative may withhold the marked draft documents in their entirety under section 552.111 of the Government Code. If the submitted draft documents will not be released to the public in their final form, then the cooperative may not withhold them in their entireties under section 552.111 of the Government Code. To the extent the draft documents will not be released in final form, we note portions of the draft documents consist of advice, opinions, or recommendations relating to policymaking. Further, portions of the submitted correspondence consist of advice, opinions, and recommendations related to policymaking. Thus, the information we have marked may be withheld under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either administrative matters or information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the information at issue. Consequently, the cooperative may not

withhold any of the remaining information at issue under section 552.111 of the Government Code.

We note some of the information Direct seeks to withhold was submitted to this office only by Direct, and not by the cooperative. This ruling does not address that information and is limited to the information submitted by the cooperative. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit a copy of specific information requested). However, we will address Direct's arguments against disclosure of the information actually submitted to this office by the cooperative.

Direct argues that its information regarding patented products is "protected class information" which must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by statute. Gov't Code § 552.101. We note, however, Direct has not identified any specific portion of the information at issue it seeks to withhold under section 552.101. Further, Direct has not pointed to any law, nor are we aware of any, that would make any of the submitted information confidential for the purposes of section 552.101. Therefore, we conclude the cooperative may not withhold any of the submitted information under section 552.101 of the Government Code.

Direct raises 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, 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.² 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* 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. 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Direct claims some of its information, including its pricing information, constitutes a trade secret. We note 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 the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Upon review, we find Direct has not demonstrated how any of the submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b, ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade

²The 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).

secret claim). Accordingly, the cooperative may not withhold any of the submitted information under section 552.110(a) of the Government Code.

Direct claims certain information relating to its contract with TASB constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. In advancing its arguments, Direct relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making a determination under section 552.110(b), we will only consider Direct's interest in withholding its information. Upon review, we find Direct has not demonstrated how any of the submitted information constitutes commercial or financial information, the disclosure of which would cause it substantial competitive harm. Accordingly, the cooperative may not withhold any of the submitted information under section 552.110(b) of the Government Code.

In summary, the cooperative may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they are included, the cooperative may not withhold them under section 552.107(1) of the Government Code. The cooperative may withhold the portions of the submitted correspondence we have marked under section 552.111 of the Government Code. To the extent the draft documents will be released in final form, the cooperative may withhold them in their entireties under section 552.111 of the Government Code. If the draft documents will not be released in their final form, the cooperative may withhold the information we marked within the drafts under section 552.111. 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, 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,



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Open Records Division

KLW/eb

Ref: ID# 459057

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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