ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2012

Mr. R. Brooks Moore
Managing Counsel, Governance
Texas A&M University
301 Tarrow Street, 6th Floor
College Station, Texas 77840

OR2012-18440

Dear Mr. Moore:

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# 471115 (System PIR No. SO-12-091).

The Texas A&M University System (the "system") received a request for all proposals, documents, or other public records submitted by Sodexo Services ("Sodexo") and Compass Group USA, Inc. d/b/a Chartwells and Southeast Service Corporation d/b/a SSC Service Solutions ("Compass") in response to requests for proposals for dining services, custodial services, convenience stores, landscape maintenance services, and building maintenance services; any documents referring to the evaluation of the proposals; any written determinations made by the Procurement Operations office in connection with the requests for proposals; documents that refer or relate to communications by or between any respondent to the requests for proposals and the Procurement Operations office; and all contracts or amendments entered into as a result of the requests for proposals. You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Further, although you take no position as to whether the remaining information is excepted under the Act, you state release of this information may implicate the proprietary interests of Sodexo and Compass. Accordingly, you state, and provide documentation showing, you notified Sodexo and Compass of the request for information and of their right to submit arguments to this office as to why the information at issue 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 Compass. We have considered the submitted arguments and reviewed the submitted information, a portion of which constitutes a representative sample.[1]

Initially, you state and we agree, some of the requested information was the subject of previous requests for information pertaining to any final contracts between the system and Compass, and proposals for dining services, custodial services, landscaping maintenance services, and building maintenance services. As a result of these requests, this office issued Open Records Letter No. 2012-17662 (2012). In that ruling, this office ruled the system must withhold insurance policy numbers under section 552.136 and release the remaining information in accordance with copyright law. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, the system must continue to rely on the prior ruling as a previous determination and withhold or release the information we have previously ruled on in accordance with Open Records Letter No. 2012-17662. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, because the submitted information is not encompassed by the previous determination, we will consider the submitted arguments.

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

[1]We 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.

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). 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 state the information in Exhibit B-1 consists of communications involving the system's general counsel and system employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services, these communications were confidential, and the system has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit B-1. Accordingly, the system may generally withhold the information Exhibit B-1 under section 552.107(1) of the Government Code. We note, however, that a portion of the e-mail string at issue includes an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the system separate and apart from the otherwise privileged e-mail string in which it appears, then the system may not withhold this privileged e-mail under section 552.107(1) of the Government Code.

We note 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Sodexo has submitted no comments to this office explaining how release of its information would affect its proprietary interests. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized

allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the system may not withhold any of Sodexo's information on the basis of that company's proprietary interests.

Compass raises section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note, however, Compass has not pointed to any law, nor are we aware of any, that would make any of its information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, none of Compass's information may be withheld under section 552.101 of the Government Code.

Compass states its proposal for convenience stores and its concession agreement between Compass and the system 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.[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 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. *See id.*; *see also* Open Records Decision No. 661 at 5 (1999).

Upon review, we find Compass has failed to demonstrate that any portion of the information at issue meets the definition of a trade secret. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the system may not withhold any of the submitted information under section 552.110(a) of the Government Code.

For its convenience store proposal, we find Compass has established that a portion of its information, pertaining to pricing, constitutes commercial or financial information, the disclosure of which would cause its company substantial competitive harm. Accordingly, the system must withhold the information we have marked in Compass's convenience store

---

[2]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).

proposal under section 552.110(b) of the Government Code. However, for the remainder of the convenience store proposal, we find Compass has made only conclusory allegations that the release of any of the remaining information would result in substantial damage to its competitive position. Thus, Compass has not demonstrated that substantial competitive injury would result from the release of the remainder of the convenience store proposal. *See* ORD 661 at 5 (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). Accordingly, the remainder of the convenience store proposal may not be withheld under section 552.110(b). Further, in regards to its concession agreement, we note that although Compass seeks to withhold its pricing incentive information, it was the winning bidder with respect to the contract at issue, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344–45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Thus, we find Compass has failed to demonstrate that the release of any of the remaining information would cause it substantial competitive harm. *See* ORD 661 at 5. Accordingly, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code states 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."[3] Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the system must withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code.

In summary, the system must continue to rely on Open Records Letter No. 2012-17662 as a previous determination and withhold or release the information we previously ruled on in accordance with that ruling. The system may generally withhold the information in Exhbit B-1 under section 552.107 of the Government Code. However, if the system maintains the marked non-privileged e-mail separate and apart from the otherwise privileged e-mail string in which it was included, the system may not withhold the marked e-mail under section 552.107(1). The system must withhold the information we have marked under section 552.110(b) of the Government Code. The system must withhold the information we

---

[3]The 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).

have marked under section 552.136 of the Government Code. The system must release the remaining information.

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,

Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 471115

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Richard P. Keeton
Counsel for Compass Group USA, Inc.
McGuireWoods L.L.P.
600 Travis Street, Suite 7500
Houston, Texas 77002-2906
(w/o enclosures)

Mr. Dan Ball
Sodexo Services
11044 Research Boulevard
Austin, Texas 78759
(w/o enclosures)