



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2012

Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2012-19173

Dear Ms. Allen:

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# 472221.

The Texas General Land Office (the "GLO") received two requests for (1) several categories of information related to RFP Nos. 21910B-SK and 201910-SK, documents containing certain key words from specified time periods, and information related to a named construction company, and (2) information related to "cold joints" and performance standards for certain construction. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified the third parties of the requests for information and of each party's right to submit arguments to this office as to why the submitted 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 AHRG Corporation ("AHRG"); DSW Homes, LLC ("DSW"); ilcor Commercial & Residential Contractors ("ILCOR"); Thomas Sheppard and Stonewater, Inc. ("TSS"); Sullivan Land Services ("SLS"); SWMJ Construction, Inc. ("SWMJ"); Tegrity TH1, LLC ("Tegrity"); Traton Homes, LLC ("Traton"); and Wallace Construction Company, Inc. ("Wallace"). We have

considered the submitted arguments and reviewed the submitted representative sample of information.¹

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have only received comments from AHRG, DSW, ILCOR, TSS, SLS, SWMJ, Tegrity, Traton, and Wallace. Thus, the remaining third parties have not demonstrated they have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); 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 GLO may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Next, we note AHRG, DSW, ILCOR, TSS, SLS, SWMJ, Tegrity, Traton, and Wallace seek to withhold information the GLO has not submitted for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the GLO. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.107(1) of the Government Code 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

¹We assume the "representative sample" of information 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.

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). 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.*, 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 in Attachment C constitutes communications between attorneys and employees of the GLO that were made for the purpose of providing legal services to the GLO. Additionally, you state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information in Attachment C consists of privileged attorney-client communications the GLO may withhold under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege 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 that 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. *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 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 also can 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 No. 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.* at 9.

You assert the information in Attachments B and D contain the advice, opinions, and recommendations of GLO personnel and a consultant working on behalf of the GLO regarding policymaking issues. You inform us the final forms of the draft documents have been released. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to some of the information at issue. Therefore, the GLO may withhold the information we have marked in Attachments B and D under section 552.111 of the Government Code. However, we conclude the remaining information at issue does not consist of advice, opinion, or recommendations, or is purely factual in nature. Accordingly, the GLO may not withhold any of this information under section 552.111.

SWMJ asserts its pricing in the GLO's evaluation matrix is excepted from disclosure pursuant to 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. However, section 552.104 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. *See* Open Records Decision Nos. 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 GLO does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to SWMJ's information. *See* ORD 592 (governmental body may waive section 552.104).

AHRG, SWMJ, Tegrity, TSS, and Wallace claim section 552.110 of the Government Code for their pricing information.² 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 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* Open Records Decision No. 552 at 2 (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 [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). 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

²We note although SWMJ raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we do not address SWMJ's argument under section 552.101.

list of six trade secret factors.³ This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. 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.*; Open Records Decision No. 661 (1999).

SWMJ, Tegrity, and Wallace argue the companies’ respective pricing information constitutes a trade secret. Upon review, we find SWMJ, Tegrity, and Wallace have failed to demonstrate any of the information for which the companies assert section 552.110(a) meets the definition of a trade secret, nor have SWMJ, Tegrity, or Wallace demonstrated the necessary factors to establish a trade secret claim for this information. *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 GLO may not withhold any of the information at issue on the basis of section 552.110(a) of the Government Code.

AHRG, SWMJ, Tegrity, TSS, and Wallace contend their respective pricing information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we find Wallace has established its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the

³The 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).

GLO must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find AHRG, SWMJ, Tegrity, TSS have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the company substantial competitive harm. Further, we note the pricing information of winning bidders, such as AHRG, SWMJ, Tegrity, and TSS, is generally not excepted under section 552.110(b). *See* ORD 514. *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45. We, therefore, conclude the GLO may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the GLO may withhold the information in Attachment C under section 552.107(1) of the Government Code and the information we have marked in Attachments B and D under section 552.111 of the Government Code. The GLO must withhold the information we have marked under section 552.110 of the Government Code. The GLO 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 472221

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. Anthony J. Barbieri
Counsel for AHRG Corporation
Kessler Collins, P.C.
2100 Ross Avenue, Suite 750
Dallas, Texas 75201
(w/o enclosures)

Ms. Kathleen Wimbish
President
ILCOR Commercial & Residential
Contractors
P.O. Box 6070
Austin, Texas 78762-6070
(w/o enclosures)

Mr. Mel W. Shelander
Counsel for Thomas, Sheppard
and Stonewater, Inc.
245 North Fourth
Beaumont, Texas 77701
(w/o enclosures)

Mr. William W. Sullivan
Sullivan Land Services
P.O. Box 131486
Houston, Texas 77219
(w/o enclosures)

Altura
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

American Home Builders
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Mr. Robert E. Booth
Counsel for DSW Homes, L.L.C.
Mills Shirley, L.L.P.
P.O. Box 1943
Galveston, Texas 77553
(w/o enclosures)

Ms. Barbara L. Emerson
Counsel for SWMJ Construction, Inc.
Bellinger, DeWolf & Suberg, L.L.P.
Suite 900
10000 North Central Expressway
Dallas, Texas 75231
(w/o enclosures)

Mr. Allen Halbroom
Counsel for Tegrity TH1, L.L.C.
Sneed, Vine & Perry, P.C.
900 Congress Avenue, Suite 300
Austin, Texas 78701
(w/o enclosures)

Mr. Stuart Gurney
Traton Homes
6511 Stewart Road, Suite 5
Galveston, Texas 77573
(w/o enclosures)

Mr. Cody C. Bailey
Counsel for T. L. Wallace Construction
Company, Inc.
Brunini, Grantham, Grower &
Hewes, P.L.L.C.
P.O. Drawer 119
Jackson, Mississippi 39205
(w/o enclosures)

Burghli Homes
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

CVI Developmemnt, L.L.C.
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Greenworld Restoration
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

J&B Home Builders
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Peachland Homes
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Byrdson Services, LLC
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

James W. Turner Construction, Ltd.
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

M Space Holdings, L.L.C.
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Stonewater, Inc.
c/o Ms. Ashley R. Allen
Staff Attorney
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)