



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2013

Mr. David F. Brown
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Ewell, Bickham & Brown, L.L.P.
111 Congress Avenue, Suite 400
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OR2013-07405

Dear Mr. Brown:

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# 486260 (TWIA ID No. 000021).

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for all invoices submitted to the association by Martin, Disiere, Jefferson & Wisdom ("MDJW"), and all communications related to the invoices for a specified time period. You state the association has released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. You also state release of the submitted information may implicate the proprietary interests of MDJW. Accordingly, you have notified MDJW of the request and of its right to submit arguments to this office as to why the requested 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 the

circumstances). We have received comments from MDJW.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you state the association received the request for information on February 15, 2013. You explain you sent the requestor a cost estimate on March 1, 2013. *See* Gov't Code § 552.2615. You assert the request for information was withdrawn by operation of law for failure to timely respond to the cost estimate. Upon review of a copy of the cost estimate, we find it does not comply with the requirements of section 552.2615(a) of the Government Code because it did not inform the requestor that inspection is an available less costly method of obtaining the requested information. *See id.* § 552.2615(a). Accordingly, we conclude the request for information was not withdrawn by operation of law.

Next, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not constitute invoices or communications related to the requested invoices. This ruling does not address the public availability of any information that is not responsive to the request and the association is not required to release such information in response to this request.

We next note some of the responsive information was the subject of a previous request for information, and some of the responsive information may have been the subject of the same request for information, as a result of which this office issued Open Records Letter No. 2013-04259 (2013). In that ruling, we determined, in relevant part, the association: (1) may withhold the information we marked under Texas Rule of Evidence 503; (2) may withhold the information we marked under sections 552.103 and 552.107 of the Government Code; and (3) must release the remaining information. In response to our ruling, the association has filed a lawsuit against our office. *See Texas Windstorm Ins. Ass'n v. Abbott*, No. D-1-GN-13-000988 (353rd Dist. Ct., Travis County, Tex.). Accordingly, as to the information we have marked that is at issue in the pending litigation, we will allow the trial court to resolve the issue of whether this information must be released to the public. To the extent any of the remaining responsive information now at issue in this request is also at issue in the pending litigation, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public.

We note a portion of the remaining responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter

¹Although MDJW raises section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

²We 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.

No. 2013-07209 (2013). In that ruling, we held, in relevant part, the association may withhold the information we marked in the attorney fee bills at issue under rule 503 of the Texas Rules of Evidence and section 552.110(b) of the Government Code. There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, with regard to the attorney fee bills we have marked, the association may continue to rely on Open Records Letter No. 2013-07209 as a previous determination and withhold or release that information in accordance with that ruling. *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). However, the remaining responsive information was not at issue in the previous ruling. Accordingly, we will consider your and MDJW's arguments against disclosure of this information.

Both MDJW and the association raise section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. Section 552.107(1), 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. *See* ORD 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived). Accordingly, we do not address MDJW's arguments under section 552.107(1), and the association may not withhold any of the submitted information on the basis of MDJW's arguments under section 552.107(1). However, we will address the association's arguments under section 552.107(1).

As previously noted, section 552.107(1) 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. ORD 676 at 6-7. 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). 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 you have highlighted in green consists of communications among representatives of the Texas Department of Insurance (“TDI”), the association, and the association’s outside counsel, representatives, agents, and contractors. You state, pursuant to section 441.053 of the Insurance Code, TDI has administrative oversight of the association. *See* Ins. Code § 401.053(a) (commissioner can place insurer under supervision if necessary due to insurer’s insolvency, exceeding of powers, or failure to comply with the law). You explain this relationship places TDI in the role of supervisor over the association, which includes granting TDI immediate and complete access to any information, including confidential or privileged information, that is under the association’s control, the authority to review all claims payments, and access to all claims information, including documents, comments, payments, policy information, litigation information, and analysis. You further explain Alvarez & Marsal Insurance Advisory Services, LLC (“AMIAS”) is a management consultant firm engaged by TDI and assists TDI and the association in various matters, including claims evaluation and settlements. You state these parties, the association, and the association’s outside counsel, representatives, agents, and contractors are all privileged parties because they share a common legal interest in regards to the matters at issue. *See* TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state the communications at issue were made in furtherance of the rendition of professional legal services to the association. You also state these communications were not intended to be, and have not been, disclosed to parties other than those encompassed by the attorney-client privilege. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the association may withhold the information we have marked under section 552.107(1).³ We note, however, some of the remaining responsive information at

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

issue does not indicate it was communicated. As such, we find you have failed to demonstrate how this information consists of privileged attorney-client communications. Accordingly, none of the remaining responsive information at issue may be withheld under section 552.107.

MDJW and the association both raise section 552.103 of the Government Code for some of the remaining responsive information. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address MDJW's argument under section 552.103. *See* Open Records Decision Nos. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception), 542 (statutory predecessor to section 552.103 does not implicate rights of third party). Accordingly, the association may not withhold any of the submitted information on the basis of MDJW's arguments under section 552.103. However, we will address the association's arguments under section 552.103.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* Open Records Decision No. 551 at 4 (1990).

You assert the remaining information you have highlighted in orange relates to pending litigation. You state, prior to the date of the request for information, the association was involved in multiple pending lawsuits regarding the association's handling and payment of windstorm policy claims, primarily from Hurricanes Dolly, Gustav, Rita, Humberto, and Ike. We understand these lawsuits are still pending. Therefore, we find litigation was pending against the association at the time of the request. Further, based on your representations and our review, we find the information at issue is related to the pending lawsuits. Accordingly, we conclude the association may withhold the remaining responsive information you have highlighted in orange under section 552.103.⁴

We note once the information has been obtained by all parties to the pending litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

MDJW raises 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny 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,

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 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.⁵ *See* RESTATEMENT OF TORTS § 757 cmt. b. 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 5-6. 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.* § 552.110(b); 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).

MDJW argues release of some of its remaining information would cause the company substantial competitive harm. Upon review, we conclude MDJW has established the release of some of the information at issue, which we have marked, would cause the company substantial competitive injury. Therefore, the association must withhold the information we have marked under section 552.110(b).⁶ However, we find MDJW has not made the specific

⁵There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁶As our ruling is dispositive of this information, we need not address MDJW's remaining arguments against its disclosure.

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. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We note the pricing information of a government contractor is generally not excepted under section 552.110(b) because we believe the public has a strong interest in the release of prices charged by a government contractor. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the association may not withhold any of the remaining responsive information at issue under section 552.110(b).

MDJW also argues some of its remaining information constitutes trade secrets. We note pricing information pertaining to a particular proposal or 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 also Huffines*, 314 S.W.2d at 776. Upon review, we find MDJW has failed to demonstrate the information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the association may not withhold any of the remaining responsive information at issue on the basis of section 552.110(a).

MDJW also raises section 552.111 of the Government Code for the remaining responsive information. However, section 552.111 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), 522 (1989) (discretionary exceptions in general). The association does not raise section 552.111 for any of the remaining responsive information. Therefore, the association may not withhold any of the remaining responsive information under section 552.111.

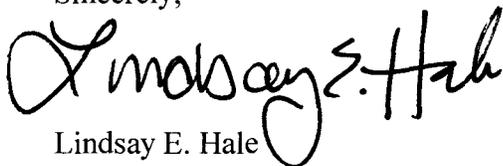
In summary, we decline to render a decision regarding the information we have marked that is at issue in the pending lawsuit and will allow the trial court to determine the public availability of that information. To the extent any of the remaining responsive information at issue in this request is also at issue in the pending litigation, we decline to render a decision regarding the specific portions of the information at issue in the pending lawsuit and will allow the trial court to determine the public availability of that information. The association may continue to rely on Open Records Letter No. 2013-07209 as a previous determination and withhold or release information we have marked in accordance with that ruling. The association may withhold the information we have marked under

section 552.107(1) of the Government Code. The association may withhold the remaining responsive information you have highlighted in orange under section 552.103 of the Government Code. The association must withhold the information we have marked under section 552.110(b) of the Government Code. The association must release the remaining responsive 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,



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Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 486260

Enc. Submitted documents

c: Requestor
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