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ATTORNEY GENERAL OF TEXAS

March 17, 2016

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2016-06233

Dear Mr. Martinez:

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# 600489 (TCEQ PIR No. 16-25035).

The Texas Commission on Environmental Quality (the "commission") received a request for e-mails sent or received by a named commission employee regarding Waste Control Specialists LLC ("WCS") over a specified time period. You state you will release some information. You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ Additionally, although you take no position as to whether the remaining information is excepted under the Act, you state release of some of the submitted information may implicate the proprietary interests of WCS.²

¹We note, although you raise section 552.111 of the Government Code, you make no argument to support this exception. Therefore, we presume you no longer assert this exception. *See* Gov't Code §§ 552.301, .302. Additionally, although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege encompassed by the Texas Rules of Evidence, 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). Further, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

²We note we asked the commission to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have considered the commission's response to that request.

Accordingly, you state, and provide documentation demonstrating, you notified WCS of the request for information and of its 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 on behalf of WCS. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we address the commission's claim under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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 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. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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

³We 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 that those records contain substantially different types of information than that submitted to this office.

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 C1 consists of communications between commission attorneys and employees that were made for the purpose of providing legal services to the commission. You state the communications were intended to be confidential and have remained confidential. Upon review, however, we note some of the e-mails at issue have been shared with individuals you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish this information, which we have marked for release, constitutes communications between or among privileged parties for the purposes of section 552.107(1) and the commission may not withhold this information on that basis. Based on your representations and our review, we find the remaining information in Attachment C1 consists of privileged attorney-client communications the commission may generally withhold under section 552.107(1). We note, however, one of the otherwise privileged e-mail strings includes an e-mail received from or sent to a non-privileged party. Furthermore, if the e-mail received from or sent to the non-privileged party is removed from the otherwise privileged 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 commission separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold this non-privileged e-mail under section 552.107(1).

Next, we consider WCS's arguments under sections 552.101 and 552.110 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by section 382.041 of the Health and Safety Code, which provides in part that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). This office has concluded section 382.041 protects information submitted to the commission if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential in submitting it to the commission. *See* Open Records Decision No. 652 (1997). The commission states, as does WCS, that some of the submitted information was designated as being confidential when it was provided to the commission. Thus, the information at issue is confidential under section 382.041 to the extent this information constitutes a trade secret. Because section 552.110(a) of the Government Code also protects trade secrets, we will address WCS's claims for the information at issue under section 552.110(a) of the Government Code.

Section 552.110 of the Government Code protects (1) trade secrets and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110. 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 763 (Tex.), *cert. denied*, 358 U.S. 898 (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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (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 [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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

WCS contends portions of the remaining information are commercial or financial information, release of which would cause substantial competitive harm to WCS. Upon review of WCS’s arguments under section 552.110(b), we conclude WCS has established the release of the information we have marked would cause the company substantial competitive injury. Accordingly, the commission must withhold the information we have marked under section 552.110(b), including WCS’s customer information to the extent it is not publicly available on WCS’s website.⁵ To the extent WCS’s customer information is publicly available on the company’s website, the commission may not withhold such information under section 552.110(b). In that event, we will address WCS’s argument under section 552.110(a) for the customer information that is publicly available on the company’s website. We find WCS has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of WCS’s remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982). We therefore conclude the commission may not withhold the remaining information under section 552.110(b).

WCS also asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. To the extent WCS’s customer information is publicly available on the company’s website and not excepted from disclosure under section 552.110(b), the commission may not withhold such information under section 552.110(a). Upon review, we conclude WCS has failed to establish a *prima facie* case the remaining information at issue meets the definition of a trade secret. We further find WCS has not demonstrated the necessary factors to establish a trade secret claim for such information. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a).

⁵As our ruling is dispositive, we need not address WCS’s remaining argument against disclosure of this information.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov’t Code § 552.137(a)-(c). However, section 552.137(a) does not apply to an e-mail address “provided to a governmental body for the purpose of providing public comment on or receiving notices related to an application for a license as defined by Section 2001.003(2) of [the Government Code], or receiving orders or decisions from a governmental body.” *See id.* § 552.137(c)(5). Upon review, we find the e-mail addresses at issue fall within the scope of section 552.137(c)(5). Thus, the e-mail addresses may not be withheld under section 552.137.

In summary, with the exception of the information we have marked for release, the commission may generally withhold the information in Attachment C1 under section 552.107(1) of the Government Code; however, if the commission maintains the non-privileged e-mail we have marked separate and apart from the otherwise privileged e-mail string in which it appears, it must be released. The commission must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent WCS’s customer information is publicly available on the company’s website, the commission must release it. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MT/dls

Ref: ID# 600489

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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