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ATTORNEY GENERAL OF TEXAS

November 16, 2016

Ms. Jessica Vu
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-22403A

Dear Ms. Vu:

This office issued Open Records Letter No. 2016-22403 (2016) on October 5, 2016. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on October 5, 2016. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 642590 (OOG ID Nos. 06-205 and 16-229).

The Office of the Governor (the "governor's office") received two requests for information pertaining to a specified request for proposals. You state you will release some information. You state the governor's office will redact social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. Although you take no position as to whether the remaining information is excepted under the Act, the governor's office informs us release of this information may implicate the proprietary interests of Ambonare; Cascade Factory; CGN Global; Cognizant; Diversified Systems, Inc.; We are a Few, LLC; Go IT Services, Inc. ("Go IT"); High Monkey; ICONMA, LLC ("ICONMA"); Insight; Kaeppel Consulting; PAVLOV;

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

Presley Design (“Presley”); Standard Beagle Studio, LLC; and Webhead. Accordingly, the governor’s office states, and provides documentation showing, it notified these third parties of the requests for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See id.* § 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 Ambonare, Cognizant, Go IT, High Monkey, ICONMA, and Presley. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note ICONMA makes arguments for withholding certain information the governor’s office did not submit to this office for review. Because we do not have this information before us for review, this ruling does not address any such information, and is limited to the information the governor’s office submitted as responsive. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Ambonare, Cognizant, Go IT, High Monkey, ICONMA, and Presley explaining why their information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110; 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 governor’s office may not withhold the submitted information on the basis of any proprietary interest the remaining notified third parties may have in the information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 “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 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 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. *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 marked consists of communications involving attorneys for the governor’s office and governor’s office employees and officials in their capacities as clients. You state the communications were made in furtherance of the rendition of professional legal services to the governor’s office. You state the 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 you have marked. Accordingly, the governor’s office may withhold the information you have marked under section 552.107(1) of the Government Code.²

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The governor’s office represents the information at issue pertains to a competitive bidding situation and no contract has been executed. You explain although the initial invitation for bids was completed, a contract was not executed and a new request for proposals will be solicited. You state the release of the

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

information you have marked “would provide potential contractors with the information regarding the bid prices.” Thus, you contend the release of the information at issue would “place the [governor’s office] at a competitive disadvantage in the bidding process and in future contract negotiations for these services.” After review of the information at issue and consideration of the arguments, we find the governor’s office has established the release of the information you have marked would give advantage to a competitor or bidder. Thus, we conclude the governor’s office may withhold the information you have marked under section 552.104(a) of the Government Code.

We note a private third party may also invoke section 552.104(a) of the Government Code. *Boeing*, 466 S.W.3d at 831, 839. Ambonare, Cognizant, High Monkey, ICONMA, and Presley raise section 552.104(a) for portions of their information. Each of these third parties state they have competitors. In addition, the third parties state release of their information at issue would give competitors an advantage in future bids. After review of the submitted information and consideration of the arguments, we find Ambonare, Cognizant, High Monkey, ICONMA, and Presley have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the governor’s office may withhold the information we have marked and the information Cognizant and Presley have indicated under section 552.104(a) of the Government Code.³

Go IT and High Monkey claim portions of the remaining information are excepted under 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 5. 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 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

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

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 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.⁴ 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 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 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. *See* Open Records Decision No. 402 (1983). 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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).

Go IT and High Monkey claim section 552.110(b) of the Government Code for portions of their respective information. Upon review, we find High Monkey has demonstrated release of its information at issue, which we have marked, would cause substantial competitive

⁴The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

injury to High Monkey. Therefore, the governor's office must withhold the information we have marked under section 552.110(b). However, upon review, we find Go IT has not demonstrated release of any of its information would cause Go IT substantial competitive harm. See Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Go IT also argues its information constitutes trade secrets under section 552.110(a) of the Government Code. However, upon review, we find Go IT has failed to establish a *prima facie* case its information at issue meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for this information. See 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 secret claim). Accordingly, no portion of the remaining information may be withheld under section 552.110(a).

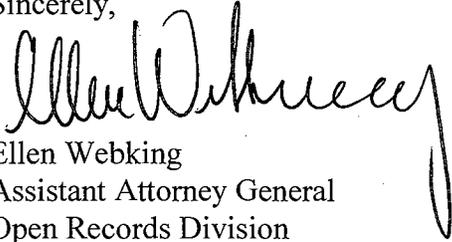
We note portions of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the governor's office may withhold the information you have marked under section 552.107(1) of the Government Code. The governor's office may withhold the information you have marked, the information we have marked, and the information Cognizant and Presley have indicated under section 552.104(a) of the Government Code. The governor's office must withhold the information we have marked under section 552.110(b) of the Government Code. The governor's office must release the remaining information; however, any information subject to copyright may be released only in accordance with copyright law.

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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 642590

Enc. Submitted documents

c: Requestor
(w/o enclosures)

14 Third Parties
(w/o enclosures)