



August 2, 2001

Mr. Arturo D. Rodriguez, Jr.
Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C.
111 Congress Avenue, Suite 1800
Austin, Texas 78701

OR2001-3356

Dear Mr. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150213.

The City of Liberty Hill (the "city") received a request for "all resumes, proposals and related correspondence" and "copies of any agreements or engagement letters" relating to the City Attorney position. You claim that the requested information is excepted from disclosure under sections 552.102, 552.104, 552.107, 552.110, 552.111, and 552.128 of the Government Code. You indicate that the property or privacy rights of a third party may be implicated by the release of the requested information. You indicate that by correspondence dated June 5, 2001, you notified the four unsuccessful bidders whose information is responsive to the request, of the request as required by section 552.305 of the Government Code. *See also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). The required notice informs each third party that it may submit to the attorney general, within ten days of receiving the notice, its reasons why the information in question should be withheld. The third parties did not respond to this notice or otherwise submit any arguments against disclosure of the requested information. On behalf of the unsuccessful bidders, you assert that the requested information is excepted from disclosure under sections 552.110

and 552.128 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the submitted documents contain information that falls within the purview of section 552.022(a)(3). Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from required disclosure unless they are made expressly confidential by law. The submitted information includes a letter of engagement between your firm and the city. The letter of engagement is a contract as contemplated by section 552.022(a)(3), and is therefore public information not excepted from public disclosure, unless the information is expressly made confidential under other law.

You contend that a portion of the document you have marked as Exhibit 3 is excepted from disclosure under section 552.107. Section 552.107 of the Government Code, which excepts information within the attorney-client privilege, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

¹Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office written comments stating the reasons sections 552.102, .104, .111, and .128 would allow the information to be withheld. Therefore, we will not consider those exceptions to disclosure.

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if 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. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.--Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

The communication at issue simply reflects the terms and conditions of the attorney's employment, the purpose for which the attorney has been engaged, fees to be paid for legal services and the method of payment. *See Borden, Inc. v. Valdez*, 773 S.W.2d 718, 720-21 (Tex. App.--Corpus Christi 1989, orig. proceeding); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App.--Amarillo 1983, writ ref'd n.r.e.); *Jim Walters Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. Civ. App.--Eastland 1979, no writ).

After reviewing your arguments and the submitted information, we find that you have not demonstrated that the letter of engagement constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Therefore, the document you have marked as Exhibit 3 is not confidential pursuant to Texas Rule of Evidence 503.

You next claim that section 552.110 will except all of the submitted information from disclosure. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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.), *cert. denied*, 358 U.S. 898 (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 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, as, for example, the amount or other terms of a secret bid for a contract 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, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining 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 this 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 (1939); *see also* Open Records Decision No. 232 (1979). 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. Open Records Decision No. 552 (1990). 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).

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 private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

You argue that the letter of engagement you have marked as Exhibit 3 is protected from disclosure as a trade secret. Although you discuss the trade secret factors, we do not believe that the information at issue contains the type of information, such as formulas, patterns, or devices, that meet the definition of a trade secret. *See also* Gov't Code §552.022(a)(16); Open Records Decision No. 319 (1982). Accordingly, we conclude that the information contained in Exhibit 3 may not be withheld under section 552.110(a) of the Government Code.

Because the unsuccessful bidders did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that their information is excepted from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (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 likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). The unsuccessful bidders' information must therefore be released to the requestor.

We also understand you to argue that the information in Exhibit 3 is excepted under section 552.110(b) because release would cause your firm substantial competitive injury. Section 552.110(b) expressly requires a demonstration, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See also* Open Records Decision No. 661 at 5-6 (1999). As there has been no such showing here, we conclude that the information in Exhibit 3 may not be withheld under section 552.110(b).

We note that some of the materials at issue 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, you must release all of the requested information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 150213

Enc. Submitted documents

c: Ms. Jennifer Jarratt
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(w/o enclosures)