



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 17, 2005

Ms. YuShan Chang  
Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

OR2005-04247

Dear Ms. Chang:

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# 224158.

The City of Houston (the "city") received a request for bids or applications submitted to the city related to a lobbying contract. While you claim no exceptions to disclosure on behalf of the city, you inform us, and provide documentation showing, that you notified the interested third parties of their right to submit arguments to this office as to why the information should not be released.<sup>1</sup> See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received correspondence from Cornerstone and Patton Boggs. We have considered all claimed exceptions and reviewed the submitted information.

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Akin Gump, Federalist, and Morgan Meguire have not submitted to this office any reasons explaining why their information

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<sup>1</sup>The following third parties received notice pursuant to section 552.305: Patton Boggs, L.L.P. ("Patton Boggs"); Cornerstone Government Affairs, L.L.C. ("Cornerstone"); Akin, Gump, Strauss, Hauer & Feld, L.L.P. ("Akin Gump"); Federalist Group, L.L.C. ("Federalist"); and Morgan Meguire, L.L.C. ("Morgan Meguire").

should not be released. Therefore, these companies have provided us with no basis to conclude that any of them has a protected proprietary interest in any of the submitted information, and none of the information may be withheld on that basis. *See, e.g.*, Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Both Cornerstone and Patton Boggs assert that information pertaining to each company is excepted from public disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See id.* at 8-9. The city does not argue that the release of any of the submitted information would harm the city's interests in a particular competitive situation. Therefore, no portion of the submitted information pertaining to Cornerstone or Patton Boggs is excepted from disclosure under section 552.104 of the Government Code.

Patton Boggs claims that some of its information is excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege.<sup>2</sup> When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See 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. *See* 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. *See In re Texas 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.

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<sup>2</sup>We note that Patton Boggs also asserts the attorney-client privilege under section 552.101 of the Government Code. Section 552.107 is the proper exception for the claim of attorney-client privilege in this instance. *See* Open Records Decision No. 676 (2002).

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, *see id.* 503(b)(1), 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.” *See 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, no writ). 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). Based on Patton Bogg’s representations and our review of the submitted information, we conclude that Patton Bogg has not demonstrated that any portion of the information at issue reflects a confidential communication between privileged parties in furtherance of the rendition of legal services to the client. Accordingly, the city may not withhold any portion of the submitted information pertaining to Patton Boggs under section 552.107 of the Government Code.

Cornerstone seeks to withhold portions of its information under section 552.110 of the Government Code. We also understand Patton Boggs to raise section 552.110 for some of its information. This section 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. *See* Gov’t Code § 552.110(a), (b).

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 . . . . 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). 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.<sup>3</sup> *Id.* 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). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure “[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). Section 552.110(b) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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<sup>3</sup>The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Upon review of the submitted information and arguments submitted by Patton Boggs and Cornerstone, we find that Patton Boggs has presented a *prima facie* case that portions of the information that it seeks to withhold are protected as trade secrets under section 552.110(a). Moreover, we have received no arguments to rebut this claim as a matter of law. Under section 552.110(b), we find that Cornerstone has sufficiently shown that the release of its customer list would result in significant competitive harm to its interests for purposes of section 552.110(b). Thus, we have marked the information that the city must withhold under section 552.110. We find that Patton Boggs and Cornerstone have failed to show that any of the remaining information that each seeks to withhold is protected as a trade secret under section 552.110(a). We also find that Patton Boggs and Cornerstone have not made the showing required by section 552.110(b) that the release of any of their remaining information would be likely to cause either party any substantial competitive harm. We therefore conclude that none of the remaining information at issue is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Finally, we note that some of the information 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 protected by copyright. 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 materials protected by copyright, 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).

To summarize, the city must withhold the marked information under section 552.110 of the Government Code. The remaining submitted information must be released to the requestor; however, in releasing information that is protected by copyright, the city must comply with applicable copyright law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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/krl

Ref: ID# 224158

Enc. Submitted documents

c: Mr. Jim Snyder  
The Hill  
733 15<sup>th</sup> Street, NW, Suite # 1140  
Washington, D.C. 20005  
(w/o enclosures)

Ms. Carolina I. Mederos  
Public Policy Consultant  
Patton Boggs  
2550 M Street, NW  
Washington, D.C. 20037-1350  
(w/o enclosures)

Ms. Cheryl Jerome Moore  
Mr. David R. Clouston  
Patton Boggs, L.L.P.  
2001 Ross Avenue, Suite 3000  
Dallas, Texas 75201-8001  
(w/o enclosures)

Ms. Susan Heck Lent  
Akin, Gump, Strauss, Hauer & Feld,  
L.L.C.  
1333 New Hampshire Avenue, NW  
Washington, D.C. 20036-1564  
(w/o enclosures)

Mr. Campbell Kaufman  
Mr. Geoff J. Gonella  
Cornerstone Government Affairs,  
L.L.C.  
300 Independence Avenue, SE  
Washington, D.C. 20003  
(w/o enclosures)

Mr. Drew Moloney  
Federalist Group, L.L.C.  
1331 H Street, NW, Suite 1200  
Washington, D.C. 20005  
(w/o enclosures)

Morgan Meguire, L.L.C.  
1225 I Street, NW, Suite 300  
Washington, D.C. 20005  
(w/o enclosures)