



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 19, 2006

Ms. Kimberly A. Frost  
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OR2006-05284

Dear Ms. Frost:

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# 249544.

The Port of Houston Authority (the "authority"), which you represent, received a request for contracts and communications regarding contracts for security management and a list of employees with authority issued cell phones.<sup>1</sup> You state that you have made some of the requested information available to the requestor. You claim that some of the submitted information is exempted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also indicate that release of some of the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us and provide documentation showing that you notified the interested parties, AlliedBarton Security Services ("AlliedBarton"), Securitas Security Services, USA, Inc. ("Securitas"), Smith Protective Services ("Smith"), and Weiser Security Services, Inc. ("Weiser"), of the request and of their right to submit arguments to this office as to why their 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); *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 in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information. We have also reviewed comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>You inform us that the requestor clarified his request. *See* Gov't Code § 552.222(b)(governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

The authority claims that Exhibits A, B, C, and D are subject to section 552.107 of the Government Code. Section 552.107 protects information that comes 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 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 "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 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. 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, *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." *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 if 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 claim that Exhibits A, B, C, and D contain information that reveals or reflects confidential communications between the authority and its attorneys. You state that the purpose of the communications was to facilitate the rendition of legal services. Based on your representations and our review of the submitted information, we agree that Exhibits A,

B, C, and D are confidential communications between privileged parties. Accordingly, this information may be withheld pursuant to section 552.107.<sup>2</sup>

Section 552.101 of the Government Code 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 made confidential by other statutes. You assert that Exhibits E-1 and E-2 are confidential under sections 418.176 and 418.177 of the Texas Homeland Security Act (the "HSA"). Section 418.176 provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider[.]

Section 418.177 provides:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Gov't Code §§ 418.176, .177. The fact that information may relate to a governmental body's security concerns does not make the information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the

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<sup>2</sup>As our ruling is dispositive, we need not address your argument under section 552.111 of the Government Code for Exhibit A.

confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

You inform us that the authority maintains Exhibits E-1 and E-2 "as part of its effort to prevent, detect and investigate terrorism and related criminal activity and the information in the exhibits relates to the staffing requirements. . . at these wharves, vulnerabilities in the [authority's] security, and the [authority's] tactical plan for securing its wharves." You state that Exhibit E-2 "describes changes the [authority] must implement at its wharves to satisfy certain Coast Guard regulations that were implemented under the federal Maritime Transportation Security Act of 2002 that require the [authority] to evaluate its vulnerabilities and address those vulnerabilities through a security plan." Upon review, we find that you have demonstrated that a portion of the information in Exhibit E-2, which pertains in part to the need for additional security at specified locations, is confidential under section 418.177 of the HSA and therefore must be withheld under section 552.101 of the Government Code. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Thus, the authority must withhold the information we have marked in Exhibit E-2. However, you have not demonstrated that the remaining information in Exhibit E-2, which pertains to the cost of operating specific terminals, relates to an emergency provider's staffing requirements or tactical plan or reveals the contents of a vulnerability assessment. *See* Gov't Code §§ 418.176, .177. Therefore, none of the remaining information in Exhibit E-2 may be withheld under section 552.101 of the Government Code in conjunction with section 418.176 or section 418.177 of the HSA.

While you assert that Exhibit E-1 pertains to the provision of security services at the authority's wharves, we note that this information only relates to the cost of certain security contracts. The information in Exhibit E-1 includes the total number of hours security officers work per year, hourly rate these officers are paid, and the yearly cost of these contracts. However, Exhibit E-1 does not reveal detailed security plan information, such as the number of security officers employed, the hours specific security officers work, where security officers are stationed, or their shift rotations. Therefore, we find that the authority has not demonstrated that the information at issue relates to an emergency provider's staffing requirements or tactical plan. *See id.* § 418.176. Moreover, we find that the authority has not demonstrated that this budgetary information constitutes or reveals the contents of a vulnerability assessment. *See id.* § 418.177. Accordingly, none of the information in Exhibit E-1 may be withheld under section 552.101 of the Government Code on the basis of section 418.176 or section 418.177 of the HSA.

Next, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, AlliedBarton and Securitas have not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that these companies have a proprietary

interest in the submitted information. *See id.* § 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. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the authority may not withhold any portion of the submitted information pertaining to AlliedBarton and Securitas on the basis of any proprietary interest that these companies may have in the information.

Smith states that it labeled its information confidential and it should be treated as such. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless the submitted information falls within an exception to disclosure, it must be released.

Smith and Weiser both contend that their information is proprietary. Section 552.110 of the Government Code protects the proprietary 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 a trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.); *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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> 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 will accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for the exception and no argument is submitted that rebuts the claim as a matter of law. *See* 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). 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. *See id.*; *see also* Open Records Decision No. 661 (1999).

Smith and Weiser contend that their information is protected under section 552.110(b). After reviewing the information at issue and the arguments of the interested third parties, we conclude that Smith and Weiser have demonstrated that release of certain information would result in substantial competitive harm to them for purposes of section 552.110(b). We have marked the information that must be withheld on this basis. However, we find that Smith and Weiser have made only conclusory allegations that release of their remaining information would result in substantial competitive harm and have not provided a specific factual or evidentiary showing to support this allegation. *See* Open Records Decision No. 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). We also note that the pricing information of a winning bidder, in this instance Smith, is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government).

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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).

Weiser also claims that its remaining information is protected from disclosure under section 552.110(a) of the Government Code. We find that Weiser has not shown that any of this information meets the definition of a trade secret, nor demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 319 at 3 (1982) (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). Thus, none of the information at issue may be withheld under section 552.110(a).

We note that the remaining information contains insurance policy numbers that are subject to section 552.136 of the Government Code.<sup>4</sup> Section 552.136 in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The authority must withhold the insurance policy numbers that we have marked pursuant to section 552.136 of the Government Code.

Finally, we note that some of the submitted information appears to 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).

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the authority may withhold Exhibits A, B, C, and D under section 552.107 of the Government Code. The authority must withhold the information we have marked in Exhibit E-2 under section 418.177 of the Government Code in conjunction with section 552.101 of the Government Code. The authority must also withhold the information we have marked under sections 552.110(b) and 552.136 of the Government Code. The remaining submitted information must be released to the requestor; however, in releasing information that is protected by copyright, the authority 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).

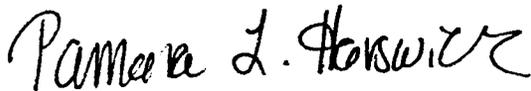
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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,



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TLH/eb

Ref: ID# 249544

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