



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 14, 2007

Ms. Renée Mauzy  
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OR2007-01909

Dear Ms. Mauzy:

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#270202.

The Texas Department of Information Resources (the "department") received thirteen different requests for specified information pertaining to the department's Data Center Services Request for Offer No. DIR-SDD-TMP-081. You state that some of the responsive information will be released. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.110, and 552.139 of the Government Code. You further inform us that the submitted information that pertains to IBM Global Services ("IBM"), Northrop Grumman Corporation ("Northrop"), and Pitney Bowes Management Services, Inc. ("Pitney Bowes"), may implicate the proprietary interests of these companies. Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, you notified IBM, Northrop, and Pitney Bowes of the request for information and of each company's right to submit arguments explaining why the information at issue should not be released. *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 Northrop. We have reviewed the submitted information,

a portion of which is a representative sample, and have considered the submitted arguments.<sup>1</sup> We have also considered comments submitted by a contractor as well as a law firm that advised the department with regard to the procurement at issue. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, 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, neither IBM nor Pitney Bowes has submitted any comments to this office explaining how release of the information at issue would affect its proprietary interests. Therefore, neither IBM nor Pitney Bowes has provided us with any basis to conclude that either company has a protected proprietary interest in any of the submitted information. *See 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. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next, the department claims that certain information created by the department's outside counsel and contractors, held by these entities, is not "public information" subject to the Act. Section 552.002(a) of the Government Code defines "public information" subject to the Act, and reads as follows:

In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Prior decisions of this office have determined that a governmental body's information held by outside counsel is subject to required public disclosure if the requestor specified that he sought information collected or maintained by the outside counsel, and the governmental body has a right of access to that information. *See Open Records Decision Nos. 663 (1999), 499 (1988), 462 (1987)*. In this instance, the department states that it has no contractual right to obtain the information at issue. Accordingly, we find that

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<sup>1</sup>We assume that 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.

the information created and held by the department's outside counsel and contractors is not public information subject to disclosure.

Both the department and Northrop assert that a portion of the submitted information may not be disclosed because the information at issue is "marked [c]onfidential/[p]roprietary." However, 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 an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

The department seeks to withhold a portion of the submitted information under section 552.104 of the Government Code. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

The department states that "release of the requested information before the open solicitation is concluded will give advantage to a competitor or bidder against [the department]." In this instance, however, the submitted information relates to a competitive process that concluded in the execution of a contract between the department and IBM. Because the open solicitation has concluded, the department may not withhold any of the submitted information under section 552.104 of the Government Code.

The department also seeks to withhold portions of the submitted information pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information 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. 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. 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 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. Finally, 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 the definition of a confidential communication 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, 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). Upon review of the information the department seeks to withhold under section 552.107, we conclude that the department has demonstrated that this information comes within the attorney-client privilege. Therefore, the department may withhold the information that it seeks to withhold under section 552.107 of the Government Code.

Both the department and Northrop seek to withhold portions of the submitted information under section 552.110 of the Government Code.<sup>2</sup> Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade

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<sup>2</sup>We note that Northrop seeks to withhold Exhibits 19 and 20, and attachments A, B, D, G, and H in Exhibit 4. This information was not submitted to this office by the department. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). 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. 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); *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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). 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).

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<sup>3</sup>The following are the six factors that the Restatement gives 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 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).

Section 552.110(b) 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 requested information. *See* 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).

The department states that “IBM contends that the resumes of its employees and its partners’ employees are confidential” under section 552.110 of the Government Code. In addition, the department has submitted certain pricing and other information pertaining to IBM, and informs us that IBM considers this information confidential under section 552.110 of the Government Code. We determine that the department has failed to demonstrate that the information at issue constitutes either a trade secret or commercial or financial information the release of which would cause substantial competitive harm to IBM for section 552.110 purposes. Further, as previously noted, IBM has submitted no arguments to this office explaining how release of the information at issue would affect its proprietary interests. We also note that pricing information of a winning bidder is generally not excepted under section 552.110 of the Government Code. *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). Accordingly, we conclude that the department may not withhold any portion of the submitted information on the basis of any proprietary interest that IBM may have in the information.

In addition, the department argues that certain information submitted as Exhibit F, pertaining to Pitney Bowes, is excepted under section 552.110 of the Government Code because such information was subject to a non-disclosure agreement between Pitney Bowes and employees of the department. As previously noted, however, a governmental body cannot through agreement or contract, overrule provisions of the Act. Additionally, we find the department has failed to demonstrate that release of the information at issue would result in substantial competitive harm to Pitney Bowes for section 552.110(b) purposes. As Pitney Bowes has submitted no arguments to this office, we find that the information at issue in Exhibit F must be released to the requestor.

After reviewing the arguments of Northrop and the information Northrop seeks to withhold, we conclude that Northrop has established a *prima facie* case that a portion of the submitted information constitutes a trade secret. Therefore, the department must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, Northrop has not demonstrated that the remaining information constitutes a trade

secret and thus the remaining information may not be withheld under section 552.110(a) of the Government Code.

However, upon review, we conclude that Northrop has demonstrated that release of certain information would result in substantial competitive harm to the company for purposes of section 552.110(b). We have marked the information that must be withheld on this basis. We find that Northrop has not established that release of their remaining information would result in substantial competitive harm to the company. *See Open Records Decision Nos. 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) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110).* Consequently, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

The department asserts that portions of the final executed contract with IBM as well as portions of IBM's best and final offer response are excepted from public disclosure under section 552.139 of the Government Code,<sup>4</sup> which provides as follows:

- (a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.
- (b) The following information is confidential:
  - (1) a computer network vulnerability report; and
  - (2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

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<sup>4</sup>We note that section 552.022(a)(3) of the Government Code provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). Because section 552.139 constitutes "other law" for purposes of section 552.022, we address the department's arguments under this exception for information in the final contract with IBM.

Gov't Code § 552.139. Upon review, we agree that the information the department seeks to withhold under section 552.139 is related to computer network security. Therefore, the department must withhold the information it has marked pursuant to section 552.139 of the Government Code.

Finally, we note that some of the remaining information is 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 materials that are subject to copyright protection 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, the department may withhold the information it has marked under section 552.107 of the Government Code. In addition, the department must withhold the information it has marked under sections 552.139, and the information we have marked under section 552.110. The remaining information must be released to the respective requestors, but any information protected by copyright must be released in accordance with 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,



Michael A. Pearle  
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MAP/krl

Ref: ID# 270202

Enc. Submitted documents

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