



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2008

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

OR2008-04769

Dear Ms. Thornton:

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# 305651.

The Office of the Governor (the "governor") received a request for "any and all information available. . . that pertains to the Emerging Technology Grant to Bauhaus Software, Inc. and MyToons, Inc. . . ." You state that some of the requested information has been released. You have submitted information that you claim is excepted from disclosure under sections 552.101, 552.107, 552.110 and 552.131 of the Government Code.¹ You also state that the governor notified Bauhaus Software Inc. and MyToons, Inc. (collectively "Bauhaus") of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released.² We received arguments under section 552.110 of the Government Code from an attorney for Bauhaus. We have considered all of the submitted arguments and have reviewed the submitted information.

¹Although you also raise sections 552.104, 552.106, and 552.111 of the Government Code, you have submitted no arguments in support of the applicability of any of those exceptions to disclosure. Therefore, this ruling does not address sections 552.104, 552.106, and 552.111. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why claimed exceptions to disclosure apply).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege.³ 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 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 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 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 that the information contained in Exhibit B consists of attorney-client communications that were made in furtherance of the rendition of professional legal services to the governor. You have identified the parties to the communications. You state that the communications were intended to be confidential, and you do not indicate that their confidentiality has been waived. Based on your representations and our review of the information at issue, we conclude that the governor may withhold Exhibit B under section 552.107(1) of the Government Code.

³We note that section 552.101 of the Government Code, which you also raise for this information, does not encompass the attorney-client privilege. *See* Open Records Decision No. 676 at 1-3 (2002).

We now turn to the governor's and Bauhaus' arguments for Exhibit C. Both the governor and Bauhaus assert that Bauhaus' information was identified as being confidential when it was provided to the governor. We note that information is not confidential under the Act simply because the party submitting the information anticipated or requested confidentiality. *See 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. *See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990)* (“[T]he obligations of a governmental body under [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 Gov't Code § 552.110). Therefore, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The governor and Bauhaus assert that the information at issue in Exhibit C is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. *See Gov't Code § 552.110*. 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.” 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. 1958); *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 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 (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. ORD 552 at 5-6. 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) 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).

Bauhaus contends that some of the information contained in Exhibit C is protected by section 552.110. The governor claims that section 552.110(b) is applicable to all of Exhibit C. After reviewing the information at issue and the submitted arguments, we conclude that Bauhaus has established a *prima facie* case that some of the information at issue is a trade secret; therefore, the governor must withhold this information, which we have marked, under section 552.110(a). We also find that Bauhaus has established that the release of some of the information at issue would cause it substantial competitive injury; therefore, the governor must withhold this information, which we have marked, under section 552.110(b). But we conclude that Bauhaus has failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* Open Records Decision No. 402 (1983). In addition, Bauhaus and the governor have made only conclusory allegations that release of the remaining information at issue would cause Bauhaus substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Furthermore, Bauhaus has made some of the information at issue publicly available on its website. Because Bauhaus has published this information, we are unable to conclude that such

⁴The 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).

information is confidential. Thus, the governor may not withhold any of the remaining information under section 552.110.

The governor also raises section 552.131(b) of the Government Code, which provides in pertinent part, “[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].” Gov’t Code §552.131(b). We note that the applicability of section 552.131 ends once the governmental body completes an agreement with the business prospect. *Id.* § 552.131(c). Because the governor had completed an Emerging Technology Fund grant agreement with Bauhaus when the governor received the present request, the governor may not withhold any of the remaining submitted information pursuant to section 552.131(b) of the Government Code.

We note that some of the remaining submitted information is subject to sections 552.101 and 552.136 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d at 685. Common-law privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 545 at 4 (1990)* (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked the personal financial information in Exhibit C that the governor must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], 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.”⁵ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked information that the governor must withhold under section 552.136.

Finally, 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, the governor may withhold Exhibit B under section 552.107 of the Government Code. The governor must withhold the personal financial information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. The governor must also withhold the information we have marked in Exhibit C under sections 552.110 and 552.136 of the Government Code. The remaining submitted information must be released; however, any information that is subject to 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 challenge 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 305651

Enc. Submitted documents

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