



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2010

Ms. Nicole B. Webster
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2010-01579

Dear Ms. Webster:

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# 369239 (LGL-09-1201).

The City of Waco (the "city") received a request for any written or electronic correspondence between city council members, city staff, and FreeFlight Systems ("FreeFlight") regarding financial matters from May 2009 to the date of the request. You state the city has released some responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.131 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of FreeFlight and Elm Creek Partners I, L.P. ("ECP"). Accordingly, pursuant to section 552.305 of the Government Code, you have notified FreeFlight and ECP of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *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 the applicability of exception to disclose under Act in certain circumstances). We have received comments from the attorney for FreeFlight and ECP. We have considered the

submitted arguments and reviewed the submitted information, part of which is a representative sample.¹

We must first address the city's obligations under the Act. Pursuant to section 552.301(e)(1) of the Government Code, within fifteen business days of receiving the request, a governmental body is required to submit to this office (1) 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. See Gov't Code § 552.301(e)(1)(A)-(D). Furthermore, section 552.301(e)(2) requires a governmental body to "label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy." *Id.* § 552.301(e)(2). You state the request for information was received on November 6, 2009. Accordingly, the city's fifteen-business-day deadline was December 2, 2009. Although you timely raised sections 552.111 and 552.131(b) of the Government Code and indicated these exceptions apply to Exhibit 4, you did not indicate sections 552.111 and 552.131(b) apply to Exhibit 3 until December 3, 2009. Consequently, we find the city has failed to comply with the requirements of section 552.301(e)(2).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301(e) results in the legal presumption the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason as to why the information should not be disclosed. See *id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.— Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.— Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.— Austin 1990, no writ); see also Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Sections 552.111 and 552.131(b) of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.111). In failing to comply with section 552.301 with respect to Exhibit 3, the city has waived its claims under sections 552.111 and 552.131(b) for Exhibit 3. Therefore,

¹We assume 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 city may not withhold any portion of Exhibit 3 under these exceptions. However, we address your timely claim under section 552.107 of the Government Code for Exhibit 3.

Section 552.107(1) of the Government Code protects information coming 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). 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. TEX. R. EVID. 503(b)(1)(A)-(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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 Exhibit 3 is a representative sample of confidential communications between a city attorney, city staff, and other parties to the FreeFlight negotiations concerning the legal matters at issue. You have identified those parties. Further, you assert these communications were made for the purpose of representing the city during the loan negotiations. You further explain these documents were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of

legal services. Upon review of Exhibit 3, we find the information we have marked consisting of communications between the city attorney and city staff only constitute privileged attorney-client communications that the city may withhold under section 552.107(1) of the Government Code. However, our review of the remaining documents in Exhibit 3 indicates the city has interests adverse or potentially adverse to the other parties involved in the negotiations. Thus, in this situation, the parties do not share a common interest that would allow the attorney-client privilege to apply to information both parties have seen. *See In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Thus, we find the city has failed to demonstrate the remaining information in Exhibit 3 constitutes or documents privileged attorney-client communications that were made in connection with the rendition of professional legal services to the city. Consequently, the remaining information in Exhibit 3 may not be withheld under section 552.107(1).

Section 552.131(b) of the Government Code provides “[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). You claim Exhibit 4 is excepted from disclosure under section 552.131(b). You state Exhibit 4 pertains to information concerning a loan that would be extended to FreeFlight as an incentive for job retention and employment benefit requirements. You further state the incentives have not been finalized and no agreements have been made. Upon review, we find the city has demonstrated Exhibit 4 reveals financial incentives that are being offered to the business prospect. Thus, we conclude the city may withhold Exhibit 4 under section 552.131(b).²

Next, we address the arguments submitted by FreeFlight and ECP, FreeFlight’s largest shareholder whose information was also submitted to the city during the loan negotiations. FreeFlight and ECP argue their information, which you have submitted as Exhibit 5, is excepted from disclosure 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: (1) trade secrets and (2) commercial or financial information, the release of which would cause a third party substantial competitive harm. *See id.* § 552.110(a)-(b). 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.” *Id.* § 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:

²As our ruling for Exhibit 4 is dispositive, we do not address your remaining argument against its disclosure.

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 a single or ephemeral event 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.³ This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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. *Id.*; Open Records Decision No. 661 (1999).

FreeFlight contends portions of its information qualify as trade secret information under section 552.110(a). Upon review, we find FreeFlight has made a *prima facie* case that some of its client information is protected as trade secret information. We note, however, FreeFlight publishes the identities of most of its clients on its website. In light of

³The 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).

FreeFlight's own publication of such information, we cannot conclude the identities of these published clients qualify as trade secrets. Furthermore, we determine FreeFlight has failed to demonstrate that any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the city must only withhold the information we have marked in Exhibit 5 pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining information in Exhibit 5 is excepted from disclosure under section 552.110(a).

FreeFlight and ECP claim their information in Exhibit 5 is subject to section 552.110(b). Upon review of the arguments submitted by FreeFlight and ECP, we find both companies have established release of their financial statements and information evidencing their size and profitability would cause both companies substantial competitive harm. Therefore, the city must withhold the information we have marked in Exhibit 5 under section 552.110(b) of the Government Code. Although FreeFlight also argues its customer information is subject to section 552.110(b), as previously stated, FreeFlight has published the identities of some of its customers on its website. Thus, FreeFlight has failed to demonstrate that release of these customers' information would cause it substantial competitive injury. Additionally, we find FreeFlight and ECP have failed to provide specific factual evidence demonstrating that release of any of the remaining information in Exhibit 5 would result in substantial competitive harm to the companies. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, the companies have not demonstrated that substantial competitive injury would result from the release of any of their remaining information in Exhibit 5. Accordingly, the remaining information in Exhibit 5 may not be withheld under section 552.110(b).

FreeFlight and ECP also raise section 552.131 of the Government Code. Section 552.131 is applicable to economic development information and provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (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.

(b) Unless and until an agreement is made with the 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(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* § 552.131(a). Thus, the protection provided by section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. FreeFlight and ECP have failed to explain how their remaining information in Exhibit 5 constitutes a trade secret or how its release would cause the companies substantial competitive harm. *See id.* Accordingly, we conclude the city may not withhold any portion of FreeFlight's and ECP's information pursuant to section 552.131(a) of the Government Code. Further, as previously discussed, section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the city does not assert section 552.131(b) for Exhibit 5, we conclude no portion of the remaining information in Exhibit 5 is excepted under section 552.131(b).

ECP also claims its remaining information in Exhibit 5 is excepted from disclosure under section 552.143 of the Government Code. Section 552.143 provides in part that "[a]ll information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) [of the Government Code] is confidential and excepted from [required public disclosure]." *Id.* § 552.143(a). Section 552.143(d)(1) defines a private investment fund as "an entity, other than a governmental body, that issues restricted securities to a governmental body to evidence the investment of public funds for the purpose of reinvestment." *Id.* § 552.143(d)(1). ECP states section 552.143 applies because it was formed for the purpose of issuing restricted securities. ECP does not represent, and the submitted information does not show, ECP issues restricted securities to a governmental body to evidence the investment of public funds for the purpose of reinvestment. Consequently, we find ECP has failed to demonstrate it is a private investment fund for purposes of section 552.143. We therefore conclude the city may not withhold any of the remaining information in Exhibit 5 under section 552.143 of the Government Code.

We note portions of the remaining information in Exhibits 3 and 5 are subject to section 552.137 of the Government Code.⁴ Section 552.137 excepts from disclosure "an

⁴This office will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

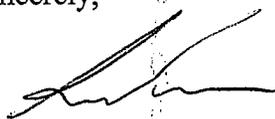
e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[,]" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). We have marked e-mail addresses the city must withhold under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.⁵

In summary, the city may withhold the information we have marked in Exhibit 3 under section 552.107 of the Government Code. The city may also withhold Exhibit 4 under section 552.131(b) of the Government Code. The city must withhold the information we have marked in Exhibit 5 under section 552.110 of the Government Code and the e-mail addresses we have marked in Exhibits 3 and 5 under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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Enc. Submitted documents

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(w/o enclosures)

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