



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2011

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-04497

Dear Ms. Soucy:

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# 413338 (Comptroller ID# 6923651314).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for the following information related to a specified request for proposals: (1) the bid tabulation sheet, (2) copies of proposals submitted by bidders, (3) documents related to the award of the contract, and (4) copies of any contract awarded. You state the comptroller will provide some of the information to the requestor. You state the comptroller will redact social security numbers pursuant to section 552.147 of the Government Code.¹ You claim a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code.² You state that the release of the remaining information may implicate the proprietary interests of certain third parties. Accordingly, you provided notice of the request to Audit Services, U.S., L.L.C. ("Audit Services"), ACS State & Local Solutions, Inc. ("ACS"), Abandoned Property Experts, L.L.C., ("Abandoned Property"), Verus Financial ("Verus"), and Compliance Services Group, L.L.C. ("Compliance") notifying them of their right to submit arguments to this office explaining why their information should not

¹Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

²Although the comptroller also initially raised section 552.107 of the Government Code, you state the comptroller no longer asserts that exception to disclosure because the requestor has narrowed her request to exclude attorney-client privileged communications. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

be released. *See* Gov't Code §552.305 (permitting interested third parties to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments submitted by Verus. We have considered the exception you claim, the arguments submitted by Verus, and reviewed the submitted information, a portion of which consists of a representative sample.³

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1–2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

³We 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 those records contain substantially different types of information than those submitted to this office.

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the requested information relates to the auditing requirements assigned to the comptroller by the Texas Property Code. You further state this information reflects the internal recommendations and opinions concerning the awarding of a contract to fulfill those auditing requirements. Upon review, we find the information we have marked constitutes advice, opinions, or recommendations that reflect the comptroller's policymaking process related to its auditing requirements. Accordingly, we conclude the comptroller may withhold the information we have marked under section 552.111 of the Government Code. However, we find the comptroller has not demonstrated how the remaining information constitutes advice, opinion, or recommendations reflecting the policymaking process or how it constitutes a draft of a policymaking document that will be released to the public in final form. Thus, the remaining information may not be withheld under section 552.111 of the Government Code. As the comptroller raises no additional exceptions against disclosure of this information, it must be released.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Audit Services, ACS, Abandoned Property, or Compliance. Thus, neither Audit Services, ACS, Abandoned Property, nor Compliance have demonstrated that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, the comptroller may not withhold the information at issue on the basis of any proprietary interests Audit Services, ACS, Abandoned Property, or Compliance may have in the information.

Verus raises sections 552.101, 552.104, and 552.110 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. While Verus generally asserts its submitted information is subject to section 552.101, it has not directed

our attention to any confidentiality provision that would make any of the submitted information confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the comptroller may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Section 552.104 of the Government Code excepts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). As the comptroller does not seek to withhold any of the submitted information under section 552.104, we find this exception is not applicable to Verus’s information. Accordingly, the comptroller may not withhold any of the submitted information under section 552.104 of the Government Code.

Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)–(b). Section 552.110(a) protects trade secrets 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 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. 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.*; see also Open Records Decision No. 661 at 5.

Verus asserts section 552.110 for the information marked as Attachment A in its submitted information. Upon review, we find that Verus has failed to demonstrate that any part of Attachment A constitutes a trade secret. Accordingly, the comptroller may not withhold any portion of this information under section 552.110(a) of the Government Code. However, Verus also argues that Attachment A consists of detailed financial information that, if disclosed, "could give an advantage to other entities seeking to engage in unclaimed property audits." Verus asserts that disclosure of this information, which includes statements of income, expenses, and losses, and details contracts with other parties, would cause it substantial competitive harm and would impede the recovery of unclaimed property. Based upon these representations and our review, we find the information we have marked constitutes commercial or financial information that, if disclosed, would cause Verus substantial competitive harm. Thus, the comptroller must withhold the information we have marked under section 552.110(b) of the Government Code. We find that Verus has not

⁴The Restatement of Torts lists the following six factors 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 other 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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

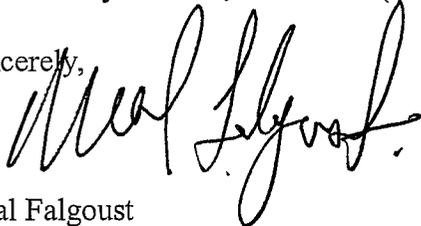
demonstrated how release of the remaining information in Attachment A would cause it substantial competitive harm. Accordingly, the comptroller may not withhold this information under section 552.110(b) of the Government Code.

In summary, the comptroller may withhold the information we have marked under section 552.111 of the Government Code. The comptroller must withhold the information we have marked pertaining to Verus under section 552.110(b) of the Government Code. The remaining information must be released.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 413338

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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