



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 15, 2014

Ms. Sarah Shirley  
Assistant General Counsel  
Texas Association of School Boards  
P.O. Box 400  
Austin, Texas 78767-0400

OR2014-06237

Dear Ms. Shirley:

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# 519576.

The Texas Association of School Boards, Inc. (the "board") received a request for eighteen categories of information including certain documents and communications related to proposal number 335-10, documents and communications related to the "Construction-Related Goods and Services Advisory" issued by the board, documents related to modular building proposals, and documents related to communications or concerns about the Professional Services Procurement Act.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of Ramtech Building Systems ("Ramtech") and Industrial Laminates Corporation ("ILCOR"). Accordingly, you state and provide documentation showing, you have notified Ramtech and ILCOR of the request and their rights to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party

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<sup>1</sup>We note the board sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Ramtech. We have considered the submitted arguments and have reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note the information we have marked is not responsive to the instant request for information because it was created after the request was received. This ruling does not address the public availability of non-responsive information, and the board is not required to release non-responsive information in response to this request.

Next, we note you have submitted only the proposals for Ramtech and ILCOR, representative samples of Ramtech's purchase orders, and certain requested communications. However, you have not submitted information responsive to the remaining portions of the request. To the extent such information existed and was maintained by the board on the date the board received the request for information, we assume it has been released. If the board has not released such information, it must do so at this time. *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 664 (2000) (if governmental body determines no exceptions apply to requested information, it must release information as soon as possible).

We also note 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 information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from ILCOR explaining why its submitted information should not be released. Therefore, we have no basis to conclude ILCOR has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 board may not withhold any portion of the responsive information based upon the proprietary interests of ILCOR.

You claim portions of the responsive information are protected by the attorney-client privilege. Section 552.107 of the Government Code 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 the information constitutes or

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<sup>2</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.

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). 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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 the information you have marked is protected by section 552.107(1) of the Government Code. You state the e-mails consist of attorney-client communications that were made between the board executive director, staff, in-house counsel, resource attorneys, and an independent consultant of the board. You state these communications were made for the purpose of rendering professional legal services to the board. You further state the communications were made to facilitate the provision of legal services. You state these communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the board may withhold the information you have marked under section 552.107(1) of the Government Code.

You seek to withhold portions of the remaining information under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “a[n] 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. This exception 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); *see also* Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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).

This office also has 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the information you have marked under section 552.111 constitutes communications between the board, board attorneys and employees, outside counsel for the board, and consultants for the board regarding policy matters. Thus, you state the information at issue consists of advice, opinions and recommendations pertaining to policymaking functions of the board. Further, you state portions of the remaining information consist of draft documents. We understand the submitted draft documents will be released to the public in their final forms. Therefore, the board may withhold the draft documents we have marked in their entireties under section 552.111 of the Government Code. Further, portions of the submitted correspondence consist of advice, opinions, and recommendations related to policymaking. Thus, the information we have marked, may be withheld under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the information at issue. Consequently, the board may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Ramtech asserts some of its information is excepted under section 552.110 of the Government Code. Section 552.110 of the Government Code 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.<sup>3</sup> 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 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Ramtech claims some of its information constitutes a trade secret subject to 552.110(a). Upon review, we find Ramtech has established a *prima facie* case that its customer information constitutes a trade secret. Therefore, to the extent the customer information contained within the submitted information is not publicly available on Ramtech’s website, the board must withhold the customer information pursuant to section 552.110(a) of the Government Code. However, upon review, we find Ramtech has not demonstrated how any of the remaining submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. See RESTATEMENT OF TORTS § 757 cmt. b; ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, the board may not withhold any of the remaining submitted information under section 552.110(a) of the Government Code.

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<sup>3</sup>The 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).

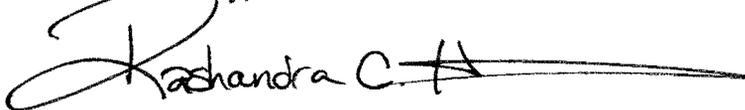
Further, we find Ramtech has failed to demonstrate how the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977). Accordingly, none of Ramtech's information may be withheld under section 552.110(b).

In summary, the board may withhold the information you have marked under section 552.107(1) of the Government Code. The board may withhold the portions of the submitted correspondence and draft documents we have marked under section 552.111 of the Government Code. To the extent the customer information contained within the submitted information is not publicly available on Ramtech's website, the board must withhold the customer information in the submitted information pursuant to section 552.110(a) 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Rashandra C. Hayes". The signature is stylized with a large, sweeping initial "R" and a long horizontal line extending to the right.

Rashandra C. Hayes  
Assistant Attorney General  
Open Records Division

RCH/tch

Ref: ID# 519576

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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