



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2014

Mr. Robert K. Nordhaus
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2014-06643

Dear Mr. Nordhaus:

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# 520562 (COSA File No. W024036-013114).

The City of San Antonio (the "city") received a request for specified information pertaining to the law firm of Flahive, Ogden & Latson, P.C. ("Flahive") and workers' compensation claims for 2013. The city claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. The city does not take a position as to whether the remaining information is excepted from disclosure under the Act. However, the city states, and provides documentation showing, it notified Flahive of the city's receipt of the request for information and of Flahive's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from Flahive objecting to the release of some of the information at issue. We have reviewed the submitted arguments and representative sample of information.¹

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

Initially, the city informs us some of the information in Exhibit 6 is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Next, the city acknowledges, and we agree, Exhibits 4 and 5 consist of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code, which provides the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the submitted arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for these exhibits.

Rule 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The city explains the information at issue in Exhibits 4 and 5 consists of confidential communications between attorneys for and employees of the city that were made in furtherance of the rendition of professional legal services. The city also asserts the communications were intended to be confidential and their confidentiality has been maintained. Having considered these representations and reviewed the information at issue, we find the city has established some of this information constitutes privileged attorney-client communications. Therefore, the city may withhold this information, which we have marked, under rule 503. However, we conclude the city has not established any of the remaining information consists of privileged attorney-client communications. Therefore, the city may not withhold this information under rule 503.

Flahive seeks to withhold some of the remaining information in Exhibits 4 and 5 under Texas Rules of Civil Procedure 192.5, which encompasses the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). However, the information at issue consists of the city’s attorney fee bills. Because the city does not raise the work product privilege under rule 192.5, we find Flahive has not demonstrated how any of the information in Exhibits 4 and 5 may be withheld on this basis. Flahive also seeks to withhold information under section 552.104 of the Government Code. However, section 552.104 is discretionary in nature and serves only to protect a governmental body’s interests, and not those of a third party, and may be waived. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Therefore,

because the city does not raise section 552.104 for the information Flahive seeks to withhold, the city may not withhold that information on that ground.

The city asserts the responsive information in Exhibit 6 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

The city explains Exhibit 6 consists of confidential communications between attorneys for and employees of the city that were made in furtherance of the rendition of professional legal services. The city also asserts the communications were intended to be confidential and their confidentiality has been maintained. After reviewing these arguments and the remaining information at issue, we find the city has demonstrated the applicability of the attorney-client privilege to this information. Thus, the city may withhold the responsive information in Exhibit 6 under section 552.107(1) of the Government Code.

Flahive asserts some of the remaining information at issue 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: trade 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office 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 section 552.110(a) applies unless it has been shown 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, 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 release of information would cause it substantial competitive harm).

Having considered Flahive's arguments and reviewed the information at issue, we find Flahive has not shown any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). We also find Flahive has failed to establish release of the information at issue would cause it substantial competitive injury. *See id.* § 552.110(b). Therefore, the city may not withhold any of the remaining information pursuant to section 552.110.

To conclude, the city may withhold the information we have marked under Texas Rule of Evidence 503. The city may withhold the responsive information in Exhibit 6 under section 552.107 of the Government Code. The city must release the remaining responsive information.

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.

²The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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, 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 520562

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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