



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 23, 2014

Mr. Michael Bostic
Assistant City Attorney
Office of the City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2014-23326

Dear Mr. Bostic:

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# 548958.

The City of Dallas (the "city") received two requests from the same requestor for specified correspondence between the Dallas Housing Financial Corporation ("DHFC") or the City of Dallas Office of Economic Development and a specified company regarding the Bruton Apartments transaction. You claim the requested information is excepted from disclosure under sections 552.111 and 552.137 of the Government Code. You also state release of the requested information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the third parties at issue of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ 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 to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from NRP. We

¹The third parties at issue are American First Real Estate Group, LLC; Bank of America, N.A.; Bracewell & Giuliani; Broad and Cassell; Coast Rose; Condon Thornton Sladek Harrell, LLP; Estrada Hinojosa & Company, Inc.; First Southwest Company; Holland & Knight, LLP; Joe Nathan Write & Associates, PC; Kutak Rock, LLP; Naman, Howell, Smith & Lee, PLLC; NRP Holdings, LLC and NRP Contractors, LLC (collectively "NRP"); Stearns Weaver Miller Weissler Alhadeff & Sitterson, PA; Stewart Title Guaranty Company; Ulmer Berne; and Wilmington Trust, NA.

have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we 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 any of the remaining third parties at issue explaining why their information should not be released. Therefore, we have no basis to conclude any of the remaining third parties at issue 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 city may not withhold any of the information at issue on the basis of any proprietary interests the remaining third parties may have in it.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information includes contracts relating to the receipt or expenditure of public funds by the city that are subject to section 552.022(a)(3). The city must release the contracts pursuant to section 552.022(a)(3), unless they are expressly made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for the information subject to section 552.022, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).

²We 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.

Therefore, the city may not withhold any of the information subject to section 552.022(a)(3), which we have marked, under section 552.111. However, we note section 552.110 of the Government Code makes information confidential under the Act. Accordingly, we will consider NRP's arguments under this exception for the information subject to section 552.022(a)(3) of the Government Code, as well as NRP's remaining information. We will also consider the city's argument under section 552.111 of the Government Code for the information that is not subject to section 552.022(a)(3).

Section 552.111 of the Government Code 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, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, we determined 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. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, 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 which the governmental body establishes it has a privity of interest or common deliberative process. *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.

You state the information not subject to section 552.022(a)(3) consists of advice, opinions, and recommendations of the city, DHFC, and other specified entities, including NRP, with respect to the Bruton Place Apartments development project (the “project”). You also state the information at issue contains draft policymaking documents that will be released to the public in final form. You state the city, DHFC, and the specified entities share a privity of interest with respect to the formation of a limited liability company for the ownership, development, construction, and management of the project. Upon review of the submitted arguments, we find the city has demonstrated it shares a privity of interest with the entities at issue with respect to the project. Upon review, we find the city may withhold some of the information at issue, which we have marked, under section 552.111 of the Government Code.³ However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the city has failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the city may not withhold the remaining information at issue under section 552.111 of the Government Code.

We note some of the submitted information may be subject to sections 552.102(a) and 552.117 of the Government Code.⁴ Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review, we find the city must withhold the date of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). Whether a particular item of information is

³As our ruling on this information is dispositive, we need not consider NRP’s arguments against its disclosure.

⁴The 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.

protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure "an 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). Gov't Code § 552.137(a)-(c). You assert the e-mail addresses you have marked are excepted from disclosure under section 552.137. We note most of the e-mail addresses you have marked are subject to section 552.137(c) and may not be withheld under section 552.137. However, we find the e-mail addresses we have marked are not a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

Next, NRP asserts its remaining information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). NRP has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude that the city may not withhold any of the remaining information under that section.

Next, NRP claims its remaining information is excepted under section 552.110 of the Government Code, which 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. *See Hyde*

Corp. v. Huffines, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.⁵ 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. *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,

⁵The 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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).

Having considered NRP's arguments under section 552.110(a), we determine NRP 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. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, the city may not withhold any of NRP's submitted information on the basis of section 552.110(a) of the Government Code.

Upon review of NRP's arguments under section 552.110(b), we find NRP has failed to make the specific factual or evidentiary showing required by section 552.110(b) for its remaining information. Thus, NRP has not demonstrated that substantial competitive injury would result from the release of any of its remaining information at issue. *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). Further, we note NRP's remaining information pertains to contracts with the city. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, none of NRP's remaining information may be withheld under section 552.110(b) of the Government Code.

In summary, the city may withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the information we have marked under section 552.102(a) of the Government Code. If the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the

Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. 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, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 548958

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Theodore Einhorn
General Counsel
NRP
5309 Transportation Boulevard
Cleveland, Ohio 44125
(w/o enclosures)

Mr. Robert Estrada
Estrada Hinojosa & Co., Inc.
1717 Main Street, 47th Floor
Dallas, Texas 75201
(w/o enclosures)

Mr. Robert Johnson
First Southwest Company
425 N. St. Paul Street, 8th Floor
Dallas, Texas 75314
(w/o enclosures)

Ms. Paula Willis
Stewart Title Guaranty Company
1980 Post Oak Boulevard, Suite
610
Houston, Texas 77056
(w/o enclosures)

Mr. Cliff Blount
Naman, Howell, Smith & Lee
8310 North Capital of Texas
Highway, Suite 490
Austin, Texas 78731
(w/o enclosures)

Mr. Gregory Hasty
Wilmington Trust
15950 North Dallas Parkway,
Suite 550
Dallas, Texas 75248
(w/o enclosures)

Mr. Timothy Nash
Kutak Rock LLP
8601 N. Scottsdale Road, Ste 300
Scottsdale, Arizona 85253
(w/o enclosures)

Mr. John Gordon
America First Real Estate Group
c/o Michael Bostic
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201
(w/o enclosures)

Ms. Victoria Ozimek
Bracewell & Giuliani
1445 Ross Avenue, Suite 3800
Dallas, Texas 75202
(w/o enclosures)

Mr. Daren Harrell
Condon Thornton Sladek Harrell
8080 Park Lane, Suite 700
Dallas, Texas 75231
(w/o enclosures)

Mr. Joe Nathan Wright
Joe Nathan Wright & Associates
12225 Greenville Ave., Ste 700
Dallas, Texas 75243
(w/o enclosures)

Mr. Richard Blinderman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson
106 East College Avenue, Suite
720
Tallahassee, Florida 32301
(w/o enclosures)

Ms. Ellen Rogers
Bank of America
100 North Tryon Street, 11th
Floor
Charlotte, North Carolina 28255
(w/o enclosures)

Ms. Sara Heskett
Holland & Knight LLP
2300 U.S. Bancorp Tower
111 Southwest Fifth Avenue
Portland, Oregon 97204
(w/o enclosures)

Mr. Bill Gagliano
Ulmer Berne
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113
(w/o enclosures)

Mr. Gene Crick
Broad and Cassell
390 North Orange Avenue, Suite
1400
Orlando, Florida 32801
(w/o enclosures)

Mr. Barry Palmer
Coats Rose
3 East Greenway Plaza, Suite
2000
Houston, Texas 77046
(w/o enclosures)