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ATTORNEY GENERAL OF TEXAS

April 2, 2015

Mr. James G. Nolan
Associate Deputy General Counsel
Open Records Division
Texas Comptroller of Public Accounts
P.O. Box 13528
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OR2015-06381

Dear Mr. Nolan:

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# 558570 (CPA ORTS# 11150243368).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for four categories of information pertaining to a specific Request for Offers. The comptroller's office states it will release some information. The comptroller's office claims a portion of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Although the comptroller's office takes no position as to whether the remaining information is excepted under the Act, the comptroller's office states release of this information may implicate the proprietary interests of Capgemini Government Solutions, LLC ("Capgemini"); Deloitte Consulting, LLP ("Deloitte"); and Sierra-Cedar, Inc. ("Sierra-Cedar"). Accordingly, the comptroller's office states, and provides documentation showing, it notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue should not be released. *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 Capgemini, Deloitte, and Sierra-Cedar. Additionally, we have received 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 information, portions of which consist of representative samples.¹

Initially, we address the requestor's assertion the information the comptroller's office submitted as a representative sample of information is not representative of the whole of the information requested. We note, in requesting a decision from this office, a governmental body may submit to this office a representative sample of information rather than submitting all the requested records. *See id.* § 552.301(e)(1)(D). In doing so, it is the governmental body's burden to assure that the 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). Whether the comptroller's office has additional information it seeks to withhold that it has not provided is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Accordingly, we must accept the comptroller's office's representation the information submitted to this office is truly representative of the information for which the comptroller's office seeks a ruling as a whole. *See* ORDs 499, 497. 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 that submitted to our office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; ORDs 499 at 6, 497 at 4.

Next, the requestor asserts the "George-Hubert form" was initially produced for review at the comptroller's office. The comptroller's office asserts that, even if the information at issue was previously produced for review, the release of the information at issue was inadvertent, and the information at issue was not intentionally made public. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Whether the "George-Hubert form" was previously released is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decisions Nos. 554 (1990), 552. Where fact issues are not resolvable as a matter of law, we must rely upon the facts alleged to us by the

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.

governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* ORD No. 522 at 4. Accordingly, we accept the comptroller's office's representation that, if the information at issue was previously produced for review, the release was inadvertent and was not intentionally made public. We note the involuntary disclosure of information on a limited basis, through no official action and against the wishes and policy of the governmental body does not waive exceptions under the Act. *See* Open Records Decision Nos. 387 at 3 (1983) (information not voluntarily released by governmental body that nevertheless comes into another party's possession not henceforth automatically available to everyone), 376 at 2 (1983); *cf.* Open Records Decision No. 676 at 10-11 (2002) (where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived). Based on the comptroller office's representation and our review, we agree the comptroller's office has not waived its claim that this information is excepted from disclosure. Accordingly, we will address the comptroller's office's claim under section 552.107 of the Government Code for the information at issue.

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 "to facilitate 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 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 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), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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).

The comptroller's office claims the information it marked is excepted from disclosure under section 552.107(1) of the Government Code. The comptroller's office states the information consists of communications between attorneys and employees of the comptroller's office. Additionally, the comptroller's office states these communications were made for the purpose of facilitating the rendition of professional legal services, the confidentiality of the communications has been maintained, and the communications have not and were not intended to be shared with any third parties. Based on the comptroller's office's representations and our review, we find the comptroller's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the comptroller's office may withhold the information it marked pursuant to section 552.107(1) of the Government Code.

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 (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 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 (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)*. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *ORD 615 at 4-5*. 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 has also concluded a preliminary draft of a document 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.

The comptroller's office asserts the information it marked under section 552.111 of the Government Code consists of advice, recommendations, and opinions regarding policymaking decisions. The comptroller's office also informs us the information at issue includes draft documents that reflect the deliberations of the comptroller's office's staff. The comptroller's office states it intends to release these draft documents to the public in their final form. Based on these representations and our review, we find the comptroller's office may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information consists of general administrative information that does not relate to policymaking or is purely factual in nature. Thus, we find the comptroller's office has failed to demonstrate how any of the remaining information is excepted under section 552.111. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code.

Next, we address section 552.110 of the Government Code for the third party information. 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). We note 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 the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

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

Upon review, we find Capgemini and Deloitte have established *prima facie* cases their customer information, as well as the additional information we have marked, constitute trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information at issue is not publicly available on the companies' respective websites, the comptroller's office must withhold Capgemini's and Deloitte's customer information under section 552.110(a) of the Government Code. Further, the comptroller's office must withhold the additional information we have marked under section 552.110(a). However, we find Capgemini and Deloitte have failed to establish any of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. *See* 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). Therefore, none of the companies' remaining information may be withheld under section 552.110(a).

Capgemini and Deloitte further argue their information consists of commercial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Capgemini and Deloitte have demonstrated their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the comptroller's office must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Capgemini and Deloitte have failed to demonstrate the release of any of their remaining information would result in substantial harm to their competitive positions. *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 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, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of the companies' remaining information may be withheld under section 552.110(b).

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)–(2). Section 2059.055 of the Government Code provides in part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). Sierra-Cedar asserts section 552.139 for some of its information. Sierra-Cedar claims the information at issue “incorporates highly-confidential information about [Sierra-Cedar]’s data centers, including [Sierra-Cedar]’s security systems, security and disaster recovery policies, maintenance and back up schedules, and an audit report concerning security measures in place at those data centers.” However, upon review, we find Sierra-Cedar has not demonstrated how any of the information at issue relates to computer network security, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Further, we find Sierra-Cedar has failed to explain how any of this information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the comptroller’s office may not withhold any of Sierra-Cedar’s information under section 552.139 of the Government Code.

In summary, the comptroller’s office may withhold the information it marked pursuant to section 552.107(1) of the Government Code. The comptroller’s office may withhold the information we have marked under section 552.111 of the Government Code. To the extent

it is not publicly available on the companies' respective websites, the comptroller's office must withhold Capgemini's and Deloitte's customer information under section 552.110(a) of the Government Code. The comptroller's office must withhold the additional information we have marked under section 552.110(a). The comptroller's office must withhold the information we have marked 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.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,



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RSH/dls

Ref: ID# 558570

Enc. Submitted documents

c: Requestor
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