



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 10, 2018

Mr. Neal Falgoust
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2018-00740

Dear Mr. Falgoust:

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# 691043 (PIA Nos. 37648, 37764, 37769, 37926, 38050, 38047, and 38122).

The City of Austin (the "city") received seven requests for information pertaining to the city's recruitment of a new city manager. You state the city has released some information. You state the city has no information responsive to portions of the requests.¹ You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.137 of the Government Code.² You also state you notified Russell Reynolds Associates ("Russell Reynolds") of the requests for information and of its right to submit arguments to this office as to why the submitted information 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 Russell Reynolds. We have considered the submitted arguments

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings.

and reviewed the submitted information. We have also received and considered comments submitted by a representative of the second requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, the second requestor's representative notes his client has filed a Petition for Writ of Mandamus against the city regarding the information she seeks in her request. *See Cox Tex. Newspapers, L.P. v. City of Austin*, Cause No. D-1-GM-17-006050 (53rd Dist. Ct., Travis County, Tex.). We note, however, this office has not previously ruled on the information at issue. If a previous determination does not apply to information that a governmental body wants to withhold from disclosure, section 552.306 of the Government Code calls for this office to render a decision "not later than the 45th business day after the date [this office] received the request for a decision." Gov't Code § 552.306. Section 552.306 does not authorize this office to refuse to perform the duty to issue an open records ruling simply because the same disclosure question is pending before a Texas Court. Open Records Decision No. 687 at 3 (2011). Under section 552.306, unless this office has already ruled on the precise question to that governmental body, this office is directed in mandatory language to rule whenever a government body seeks an open records ruling. *Id.*; *see also Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (holding Attorney General may not refuse to fulfill his duty to render open records decision). Accordingly, we will address the applicability of the Act to the information at issue.

Next, we note you have marked a portion of one of the submitted e-mail chains as not responsive. Upon review, however, we find the information at issue is responsive because it is contained within a responsive e-mail chain. We will therefore address your claimed exceptions for the entirety of the submitted information.

Next, we note you have redacted some information in the submitted documents. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *Id.* § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the city has been authorized to withhold the redacted information without seeking a ruling from this office. *Id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of some of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting any information that it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302. However, we are unable to discern the nature of the remaining redacted information. Therefore, the city has failed to comply with section 552.301 of the Government Code as to this information, and this information is presumed public under

section 552.302 of the Government Code. Accordingly, the city must release this redacted information, which we have marked for release.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You state the city has specific marketplace interests in the information at issue because the city is competing “in a limited marketplace to attract qualified individuals” to hire a city manager.” You also state release of the information at issue would “undermine the [c]ity’s negotiating ability by forcing it to increase its compensation beyond what it might otherwise offer” or cause the candidates to “refuse to be considered out of concern that their current employment would be jeopardized.” However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. *See, e.g.*, Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 “designed to protect interests in commercial transactions”), 592 at 5 (1991), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 “has been construed to protect the sealed bid process”), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). In light of this office’s prior interpretations of section 552.104, we are not persuaded that a competition among applicants for a position of public employment is a competitive situation contemplated by section 552.104. *Cf.* ORD 463 at 2 (stating, by analogy, that “competition” between two job applicants seeking one job offered by the state is not a process the statutory predecessor to section 552.104 was intended to protect). Therefore, we find you have failed to demonstrate the applicability of section 552.104 in this instance. Russell Reynolds also raises section 552.104 for some of this information. A private third party may invoke this exception. *Boeing*, 466 S.W.3d 831. However, upon review, we find Russell Reynolds has failed to demonstrate the release of the information at issue would give advantage to a competitor or bidder. Accordingly, the city may not withhold any of the information at issue under section 552.104.

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.*, 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).

You state the information at issue constitutes notes and communications between attorneys for the city and city employees in their capacities as clients. You state the communications were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential 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. Thus, the city may generally withhold the e-mails you marked under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails received from a non-privileged party. Furthermore, if the e-mails received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the fifth request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Russell Reynolds asserts the information at issue is subject to common-law privacy. Upon review, we find none of the remaining information is highly intimate or embarrassing and not of legitimate

public concern. Therefore, the city may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person 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.³ RESTATEMENT OF TORTS § 757 cmt. b. 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* Open Records Decision No. 552 at 5 (1990). However, we

³The 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).

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 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 (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).

Russell Reynolds asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. However, upon review, we conclude Russell Reynolds has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Russell Reynolds has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, the city may not withhold any of Russell Reynolds’s information under section 552.110(a).

Russell Reynolds further argues portions of its information consist of commercial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. However, upon review, we find Russell Reynolds has failed to demonstrate the release of any of its information would result in substantial harm to the company’s 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, 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, the city may not withhold any of Russell Reynolds’s information under section 552.110(b).

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). *See* Gov’t Code § 552.137(a)-(c). We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor’s agent, or to an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address a governmental entity maintains for one of its officials or employees. *Id.* § 552.137(c). Therefore, the city must withhold all personal e-mail addresses not excluded by subsection (c) under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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.⁴ *See id.* § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is 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. Therefore, to the extent the information we have marked pertains to current or former city employees that 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; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, the city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov’t Code § 552.1175. Section 552.1175 applies to “criminal investigators of the United States as described by Article 2.122(a), Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(7). The information we have marked pertains to an agent

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of the United States Drug Enforcement Administration. Thus, the city must withhold the information we have marked under section 552.1175 of the Government Code if the individual elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code. However, if the individual does not elect to restrict access to this information in accordance with section 552.1175(b), then the city may not withhold this information under section 552.1175.

We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city may generally withhold the information you marked under section 552.107(1) of the Government Code; however, if the city maintains the non-privileged e-mails separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The city must withhold all personal e-mail addresses not excluded by subsection (c) under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. To the extent the information we have marked pertains to current or former city employees that 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; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The city must withhold the information we have marked under section 552.1175 if the individual elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code. The city must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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,

A handwritten signature in dark ink, appearing to read "Matthew Taylor", with a long horizontal flourish extending to the right.

Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/tdw

Ref: ID# 691043

Enc. Submitted documents

c: 7 Requestors
(w/o enclosures)

2 Third parties
(w/o enclosures)

