KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2016

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2016-13530A

Dear Ms. Downey:

This office issued Open Records Letter No. 2016-13530 (2015) on June 14, 2016. Since that date, the Office of the Attorney General (the "OAG") informs us, at the time of its request for a decision, the OAG failed to submit information pertaining to CACI for review by our office. Thus, we must address the interests of CACI whose proprietary interests are at issue for this newly submitted information. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on June 14, 2016. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 627411 (PIR No. 16-43678).

The OAG received a request for information pertaining to the merger of US Airways Group Inc. and the parent corporation of American Airlines during a specified time period. You state the OAG will release some information. You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence. Additionally, you state release of some of this information may implicate the proprietary interests of American Airlines Group ("American") and CACI. Accordingly, you state you 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.[1] *See id.* § 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 on behalf of American. We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.[2]

Initially, the OAG states some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-16308 (2013) and 2013-17778 (2013). In Open Records Letter No. 2013-16308, this office held, in pertinent part, the OAG must withhold the civil investigative demand documents at issue under section 552.101 of the Government Code in conjunction with section 15.10(i) of the Business and Commerce Code. In Open Records Letter No. 2013-17778 this office held the OAG must withhold the civil investigative demand documents at issue in that ruling under section 552.101 of the Government Code in conjunction with section 15.10(i) of the Business and Commerce Code. The OAG states the law, facts, or circumstances on which the prior rulings were based have not changed with respect to the information subject to section 15.10(i) of the Business and Commerce Code. Thus, the OAG must continue to rely on Open Records Letter Nos. 2013-16308 and 2013-17778 as previous determinations and withhold that information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address the public availability of the remaining information at issue.

Next, American seeks to withhold information the OAG did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as a representative sample of responsive information by the OAG. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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[1]We note the OAG did not comply with section 552.301(e) of the Government Code in submitting some of the information at issue. *See* Gov't Code § 552.301(e). However, because third party interests are at stake for this information, we will consider whether this information must be withheld under the Act based on third party interests. *See id.* §§ 552.001, .302, .352.

[2]We 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.

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 CACI explaining why its information should not be released. Therefore, we have no basis to conclude CACI has a protected proprietary interest in the information at issue. *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 OAG may not withhold any of the information at issue on the basis of any proprietary interest CACI may have in the information.

The OAG informs us the information at issue falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (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:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The OAG states the information at issue is part of a completed investigation subject to section 552.022(a)(1). The OAG must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* The OAG raises section 552.101 of the Government Code, which protects information made confidential under law, section 552.102 of the Government Code, which makes information confidential under the Act, and section 552.107(2), which encompasses information ordered prohibited from disclosure by a court.[3] In addition to also raising sections 552.101 and 552.107(2), American raises section 552.110 of the Government Code, which makes information confidential under the Act, as well as section 552.104 of the Government Code. Information encompassed by section 552.022(a)(1) may be withheld under section 552.104. *See id.* § 552.104(b) (information protected by section 552.104 not subject to required public

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[3]We note section 552.022(b) of the Government Code does not apply to the court order at issue. *See* Gov't Code § 552.022(b) ("A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or not to produce the category of public informaiton for inspection or duplication, unless the category of information is confidential under this chapter or other law.")

disclosure under section 552.022(a)). Further, 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 purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address the submitted arguments under sections 552.101, 552.102, 552.104, 552.107(2), and 552.110, as well as Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
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> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
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> > (B) between the client's lawyer and the lawyer's representative;
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> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
> >
> > (D) between the client's representatives or between the client and the client's representative; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The OAG asserts the information it marked in Exhibit B consists of notes taken by OAG attorneys and communications between OAG attorneys and investigators for the OAG's Consumer Protection Division ("CPD"), as well as communications between OAG attorneys and other privileged parties in a certain multi-state lawsuit. The OAG states the communications were made for the purpose of providing legal services to the OAG and the State of Texas. The OAG further states the communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Based on the submitted representations and our review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the information it marked. Accordingly, the OAG may withhold the information it marked under rule 503.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work-product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work-product aspect of the work-product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work-product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work-product information that meets both parts of the work product test is

confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

The OAG claims the information it marked in Exhibit B consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. The OAG states the information at issue includes interview notes for parties who provided information during the course of the investigation at issue. The OAG asserts these attorney notes constitute core work product. The OAG further asserts the information at issue was created by CPD attorneys in anticipation of litigation and for trial. The OAG argues this information consists of mental impressions, opinions, conclusions, or legal theories of CPD attorneys. Having considered the submitted arguments and reviewed the information at issue, we conclude the information at issue constitutes privileged attorney core work product that may be withheld under rule 192.5. Accordingly, the OAG may withhold the information it marked under Texas Rule of Civil Procedure 192.5.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). The OAG and American argue some of the remaining information must be withheld under section 552.107(2). The OAG has submitted a copy of a Stipulated Protective Order Concerning Confidentiality (the "protective order") that was issued by the United States District Court for the District of Columbia. The protective order encompasses certain information that is designated "Confidential Information" by certain persons. Paragraph 11 of the protective order provides nothing in the order "(d) prevents disclosure by a [p]arty of Confidential Information . . . (iv) pursuant to an order of a [c]ourt or as may be required by law[.]" Paragraph 11 further provides nothing in the order "(e) prevents [p]laintiffs . . . from disclosing information designated as Confidential Information . . . (iii) as may be required by law." The Act is one such law that requires the information to be released, subject to the Act's exceptions to disclosure. Thus, we conclude the OAG and American have not demonstrated the protective order makes the information at issue confidential for purposes of section 552.107(2). Therefore, we find the OAG may not withhold any of the information at issue under section 552.107(2) of the Government Code.

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). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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." *Id.* at 841. American states it has competitors. In addition, American explains the information it has indicated could be used by its competitors to target and undercut the company, threatening American's interests in attracting and maintaining customers in its industry and providing a pricing advantage over American. After review of the information at issue and consideration of the arguments, we find American has established the release of the

information for which it raises section 552.104(a) would give an advantage to a competitor or bidder. Thus, we conclude the OAG may withhold this information, which we have marked, under section 552.104(a).[4]

American argues some of its remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) protects trade secrets 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, 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 763 (Tex.), *cert. denied*, 358 U.S. 898 (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.[5] RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with

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[4]As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

[5]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (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).

regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Upon review, we find American has established a *prima facie* case some of its remaining information at issue constitutes trade secrets. Accordingly, the OAG must withhold the information we have marked under section 552.110(a).[6] However, we find American has failed to demonstrate its remaining information for which it raises section 552.110(a) meets the definition of a trade secret. Additionally, we find American has not demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the OAG may not withhold the remaining information at issue under section 552.110(a).

The OAG and American state some of the remaining information at issue is confidential under federal law. 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. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. *See, e.g.*, Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 272 (1981). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that chapter 552 of the United States Code, the federal Freedom of Information Act ("FOIA"), applies only to federal agencies and does not apply to records held by state agencies. *See* ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that: "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

The OAG and American explain some of the remaining information at issue was obtained by the United States Department of Justice ("DOJ") pursuant to the DOJ's statutory authority

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[6]As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

under the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), and through Civil Investigative Demands ("CIDs") pursuant to the federal Antitrust Civil Process Act of 1962 ("ACP Act"). *See* 15 U.S.C. §§ 18a(d), (e)(1)(A) (authorizing DOJ to require the submission of information related to a proposed acquisition to determine whether such acquisition would violate federal antitrust laws), 1312(a) (authorizing DOJ to serve CID requiring production of materials, written interrogatories, or oral testimony for information relevant to a civil antitrust investigation). The HSR Act provides, in pertinent part, the following:

> Any information or documentary material filed with the [United States] Assistant Attorney General [in charge of the Antitrust Division of the DOJ] or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5 [of the United States Code (FOIA)], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

Id. § 18a(h). The ACP Act provides, in relevant part:

> Any documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under [the ACP Act] shall be exempt from public disclosure under section 552 of Title 5 [of the United States Code (FOIA)].

Id. § 1314(g). The OAG and American state the information at issue constitutes confidential HSR Act and CID information obtained by the DOJ. The OAG further explains the DOJ provided the information at issue to the OAG's CPD as part of a combined federal and multi-state investigation, and the DOJ and OAG shared a common interest in the investigation at issue. Upon review, we find the OAG must withhold the information at issue, a representative sample of which it has indicated, under section 552.101 of the Government Code in conjunction with federal law.[7] American generally asserts some of the remaining information at issue is subject to section sections 18a(h) and 1314(g). Upon review, we find the remaining information may not be withheld under section 552.101 on these bases.

Section 552.101 of the Government Code also encompasses section 15.10(i)(1) of the Business and Commerce Code, which reads as follows:

> (1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of

[7]As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

> oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i)(1). We understand section 15.10(b) of the Business and Commerce Code authorizes the OAG to issue a Civil Investigative Demand when the attorney general has reason to believe any person may be in possession, custody, or control of any documentary material or may have information relevant to a civil antitrust investigation. *Id.* § 15.10(b). American generally asserts some of the remaining information at issue is subject to section 15.10(i). Upon review, we find the remaining information may not be withheld under section 552.101 on that basis.

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 (Tex. 2010). Upon review, we find the OAG must withhold the information it marked under section 552.102(a).

In summary, the OAG must continue to rely on Open Records Letter Nos. 2013-16308 and 2013-17778 as previous determinations and withhold the civil investigative demand documents at issue in those rulings under section 552.101 of the Government Code in conjunction with section 15.10(I) of the Business and Commerce Code in accordance with those rulings. The OAG may withhold the information it has marked under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The OAG may withhold American's information we have marked under section 552.104(a) of the Government Code. The OAG must withhold American's information we have marked under section 552.110(a) of the Government Code. The OAG must withhold the information it has indicated under section 552.101 of the Government Code in conjunction with federal law. The OAG must withhold the date of birth it has marked under section 552.102(a) of the Government Code. The OAG must release the remaining 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.

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,

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 627411

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)