



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 8, 2019

Ms. Deanne Rienstra
Special Counsel
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2019-00473

Dear Ms. Rienstra:

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# 742211 (Ref. No. L-24408).

The Texas Lottery Commission (the "commission") received a request for documentation related to the process for granting and amending certain contracts.¹ You state you have released some information to the requestor. We understand the commission will withhold certain e-mail addresses pursuant to Open Records Decision No. 684 (2009).² You claim some of the submitted information is excepted from disclosure under sections 552.101,

¹The commission states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including certain e-mail addresses, without the necessity of requesting an attorney general decision.

552.107, 552.111, and 552.139 of the Government Code.³ Additionally, you state the release of the submitted information may implicate the proprietary interests of International Gaming Technologies (“IGT”). Accordingly, the commission states, and provides documentation showing, it notified IGT of the request for information and of the 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). The commission has provided comments from IGT to our office. We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample of information.⁴

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 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. IGT states it has competitors. In addition, IGT states release of the information at issue would cause IGT harm. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 841. After review of the information at issue and consideration of the arguments, we find IGT has established the release of the information at issue would give advantage to a

³We note the commission failed to comply with section 552.301 of the Government Code with respect to some of the submitted information; however, the interest of a third party and sections 552.101 and 552.139 can provide compelling reasons to withhold information sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. *See* Gov’t Code §§ 552.301, .302. Accordingly, we will consider IGT’s arguments as well as the applicability of sections 552.101 and 552.139 to this information.

⁴We 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.

competitor or bidder. Thus, we conclude the commission may withhold the information we have indicated under section 552.104(a) of the Government Code.⁵

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, including section 466.022(b) of the Government Code. Section 466.022(b) provides that the following information is confidential and exempt from disclosure:

- (1) security plans and procedures of the commission designed to ensure the integrity and security of the operation of the lottery;
- (2) information of a nature that is designed to ensure the integrity and security of the selection of winning tickets or numbers in the lottery, other than information describing the general procedures for selecting winning tickets or numbers[.]

Id. § 466.022(b)(1)-(2). The commission states release of some of the remaining information, which it has marked, would compromise the lottery games and threaten the integrity and security of the operation of the lottery. The commission explains the information at issue contains information relating to lottery sales agent security, lottery operator and vendor security, and other aspects of lottery security. Based upon your representations and our review, we conclude the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 466.022(b) of the Government Code.⁶

IGT states portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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

⁵As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

⁶As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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.⁷ 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 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) of the Government Code 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

⁷The 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)*.

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 5-6 (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).

IGT asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude IGT has established a *prima facie* case that portions of its information constitute trade secret information. Accordingly, to the extent IGT's customer information is not publicly available on IGT's website, the commission must withhold IGT's customer information under section 552.110(a) of the Government Code. However, we conclude IGT has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find IGT has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the commission may not withhold any of IGT's remaining information under section 552.110(a) of the Government Code.

IGT further argues portions of its remaining information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find IGT has demonstrated a portion of the information at issue, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find IGT has failed to demonstrate the release of any of its remaining information would result in substantial harm to its 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 commission may not withhold any of IGT's remaining information under section 552.110(b) of the Government Code.

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). 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 commission claims some of the remaining information, which it has marked, is protected under section 552.107(1) of the Government Code. The commission states the information at issue consists of communications involving commission attorneys and commission employees in their capacities as clients. The commission states the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Based on these representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may generally withhold the e-mails and attachments you have marked under section 552.107(1) of the Government Code.⁸ We note, however, some of these e-mail strings include e-mails and attachments received from a non-privileged party. Furthermore, if the e-mails and attachments received from the non-privileged party are removed from the e-mail strings and

⁸As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachments, which we have marked, are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails and attachments under 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, 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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (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, 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 that is 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *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. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561. (We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.)

The commission raises section 552.111 for portions of the remaining information. The commission states this information consists of advice, opinions, and recommendations of the commission pertaining to its policymaking functions. The information at issue includes a draft contract, which we have marked. We understand the draft contract at issue will be made available to the public in its final form. Based on these representations and our review of the information at issue, we find the commission may withhold the draft contract we have marked under section 552.111 of the Government Code. However, because the remaining information at issue was received from a private party with whom the commission was in the process of negotiating a contract, the interests of the commission and the private party were adverse. Thus, we find the commission and the private party did not share a privity of interest or common deliberative process with respect to the information at issue. Therefore, the commission may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

In summary, the commission may withhold the information we have indicated under section 552.104(a) of the Government Code. The commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 466.022(b) of the Government Code. To the extent IGT's customer information is not publicly available on IGT's website, the commission must withhold IGT's customer information under section 552.110(a) of the Government Code. The commission must withhold the information we have marked under section 552.110(b) of the Government Code. The commission may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, if the commission maintains the non-privileged e-mails and attachments we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the non-privileged e-mails and attachments may not be withheld under section 552.107 of the Government Code. The

commission may withhold the draft contract we have marked under section 552.111 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,

A handwritten signature in black ink, appearing to read "Michelle Garza", with a long horizontal flourish extending to the right.

Michelle Garza
Assistant Attorney General
Open Records Division

MG/eb

Ref: ID# 742211

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)