KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 28, 2020

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

OR2020-02580

Dear Ms. Downey:

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# 808102 (PIR Nos. R002667, R002674, R002675, and R002679).

The Office of the Attorney General (the "OAG") received four requests from two requestors for information pertaining to named companies.[1] The OAG states it will release some information with redactions allowed by law. The OAG claims some of the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. Additionally, the OAG states, and provides documentation showing, it notified Facebook, Inc. ("Facebook"), and Google LLC ("Google") of the requests for information and of their right 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). The OAG also states, and provides documentation showing, it notified the Pennsylvania Attorney General's Office ("Pennsylvania") of one 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 § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Facebook, Google, and Pennsylvania. We have considered the

[1] We note the OAG sought and received clarification of the fourth request. *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).

claimed exceptions and reviewed the submitted information, portions of which the OAG states constitute representative samples.[2]

Initially, the OAG states some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2019-33880 (2019). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the OAG must continue to rely on Open Records Letter No. 2019-33880 as a previous determination and withhold or release the information at issue in accordance with that ruling. *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).

Next, Google argues some of its information is confidential pursuant to an agreement with the OAG. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, the OAG must release it, notwithstanding any expectations or agreement specifying otherwise.

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. We understand Pennsylvania to raise section 552.101 of the Government Code in conjunction with section 67.708 of the Pennsylvania Right-to-Know Law. *See* 65 Pa. Cons. Stat. § 67.101 *et seq*. However, section 552.101 does not incorporate the confidentiality provisions of other states' statutes and regulations because those laws only govern the disclosure of information held by entities of those states. *But see* Open Records Decision No. 561 at 6-7 (1990) (noting that if agency of federal government shares its information Texas governmental entity, Texas entity must withhold information that federal agency determined to be confidential under federal law). Accordingly, the information at issue may not be withheld under section 552.101 on the basis of Pennsylvania state law.

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

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[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.

> (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 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). The OAG explains section 15.10(b) of the Business and Commerce Code authorizes the OAG to issue a Civil Investigative Demand ("CID") 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). The OAG asserts the information at issue consists of information provided to the OAG in response to a CID issued by the OAG's Antitrust Division. The OAG represents none of the permitted disclosures in section 15.10(i) apply in this instance. After review of the information at issue and consideration of the OAG's arguments, we agree the OAG must withhold the information it marked under section 552.101 in conjunction with section 15.10(i)(l).

Section 552.101 of the Government Code also encompasses section 17.61(f) of the Business and Commerce Code, which provides, in part:

> (f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the office of the attorney general without the consent of the person who produced the material. The office of the attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

Id. § 17.61(f). This provision requires the OAG to withhold from required public disclosure all documentary material the OAG obtained pursuant to a CID. The OAG explains its Consumer Protection Division issued CIDs to the named companies under section 17.61(a) of the Business and Commerce Code. The OAG informs us the companies complied by providing the information at issue to the OAG. Thus, we agree the OAG must withhold information it marked under section 552.101 because it is information obtained pursuant to CIDs and, therefore, is confidential under section 17.61(f).

Google asserts some of its remaining information is confidential because it was produced "in response to CIDs issued by Tennessee and Washington." We note the information at issue was not produced pursuant to a demand made under section 17.61. *See id.* §§ 17.61(a) (providing the "consumer protection division" may execute and serve a CID), .45 (defining "consumer protection division" as the consumer protection division of the OAG). Accordingly, upon review, we find Google has failed to demonstrate the applicability of

section 17.61 to the information at issue. Thus, the remaining information may not be withheld under section 552.101 on this basis.

The OAG and Google both raise section 552.103 of the Government Code for some of the remaining information. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address Google's argument under section 552.103. *See* Open Records Decision Nos. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception), 542 (statutory predecessor to section 552.103 does not implicate rights of third party). Accordingly, the remaining information may not be withheld on the basis of Google's arguments under section 552.103. However, we will address the OAG's arguments under section 552.103.

Section 552.103 provides in relevant part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575

(1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The OAG states its Antitrust Division is leading a multistate investigation. The OAG states, if the Antitrust Division uncovers violations of law during this investigation, the OAG will initiate enforcement proceedings and, therefore, anticipates litigation in these matters. Therefore, we find the OAG reasonably anticipated litigation when it received the present requests for information. The OAG asserts, and we agree, the information at issue relates to the anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 to the information at issue and may withhold the information it marked under section 552.103.

However, once the information has been obtained by all parties to the pending or anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Texas Rule of Evidence 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).

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).

We understand Pennsylvania to raise the attorney-client privilege based on the substance of its arguments. Pennsylvania states the information at issues consists of communications of a "protected and investigative nature" that were shared with other states "under the common interest doctrine." *See In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50-51 (Tex. 2012) (discussing common interest doctrine under attorney-client privilege). However, we note the information at issue was shared with an individual Pennsylvania has not demonstrated to be a privileged party or Pennsylvania has not demonstrated is an individual with whom Pennsylvania shares a common interest for purposes of the attorney-client privilege. *See id.* Therefore, Pennsylvania failed to establish the information at issue constitutes privileged attorney-client communications for the purposes of the attorney-client privilege. Accordingly, the information at issue may not be withheld under rule 503.

Facebook and Google claim some of the remaining information is excepted from disclosure under section 552.110 of the Government Code. 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 at to single or ephemeral events in the conduct of 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, 776 (Tex. 1957). 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 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).

Section 552.110(b) protects "[c]ommerical 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 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).

Facebook and Google assert some of the remaining information consists of commercial or financial information, the release of which would cause the companies substantial competitive harm. Upon review of Facebook's and Google's arguments under section 552.110(b), we conclude Facebook and Google have established the release of some of their information would cause the companies substantial competitive injury. Accordingly, the OAG must withhold the information we have marked under section 552.110(b).[4] However, we find Facebook and Google have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause the companies substantial competitive harm. We therefore conclude none of the remaining information at issue may be withheld under section 552.110(b).

Facebook and Google also assert some of the remaining information constitutes trade secrets under section 552.110(a). Upon review, however, we find Facebook and Google

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[3] The 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; and
> (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).

[4] As our ruling is dispositive, we need not address Facebook's or Google's remaining arguments against disclosure of this information.

have failed to establish a *prima facie* case the remaining information at issue meets the definition of a trade secret. Furthermore, we find Facebook and Google have not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a).

In summary, the OAG must continue to rely on Open Records Letter No. 2019-33880 as a previous determination and withhold or release the information at issue in accordance with that ruling. The OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 15.10(i)(l) of the Business and Commerce Code. The OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code. The OAG may withhold the information it marked under section 552.103 of the Government Code. The OAG must withhold the information we have marked under section 552.110(b) 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 https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/eb

Ref: ID# 808102

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

3 Third Parties
(w/o enclosures)