



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 14, 2005

Mr. Renaldo L. Stowers  
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OR2005-03203

Dear Mr. Stowers:

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# 222025.

The University of North Texas (the "university") received a request for "results of feasibilities [*sic.*] studies, surveys, or other means used by the [university] for the purposes of researching a 'university brand'" and related information. You claim that a portion of the requested information is excepted from disclosure under sections 552.110, 552.111, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>You represent that, pursuant to section 552.305 of the Government Code, the university has notified interested third party Applied Behavioral Sciences Marketing, L.L.C. ("Applied") of the request for information and its right to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances).

<sup>2</sup>We assume that 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.

We first address the requestor's contention that the university's request for a decision from this office was not timely submitted. See Gov't Code § 552.301(b) (requiring a governmental body to ask for an attorney general's decision and state the exceptions that apply within ten business days after receiving the request). The requestor contends that he initially sent his request for information on January 24, 2005 followed by a duplicate request sent on January 25, 2005. The requestor further argues that "this trigger event [the January 24, 2005 request] would require that any petition to withhold information would have to be filed by February 7<sup>th</sup>." However, no documentation has been provided to this office to confirm that the university *received* an initial request on January 24, 2005. The university states that it received the request for information on January 25, 2005. The university further provided a copy of the request e-mail indicating that the request was sent on January 25, 2005 during business hours, therefore, making the information submitted to our office on February 8, 2005 timely. This office cannot resolve disputes of fact in its decisional process. See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. See Open Records Decision No. 552 at 4 (1990). Accordingly, we must accept the university's representation that it first received the request on January 25, 2005, thus making its correspondence with our office requesting a decision timely.

We will next consider the university's argument under section 552.111 of the Government Code for Exhibits A through G. Section 552.111 provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]." This section encompasses the deliberative process privilege. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 158 (Tex. App.—Austin 2001, no pet.). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. See *id.* at 158-160; Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6.

Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 158-161; ORD 615 at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted from disclosure by section 552.111. *Id.*

Section 552.111 can encompass communications between a governmental body and a third party consultant. See Open Records Decision Nos. 631 at 2 (1995) (section 552.111

encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants).

You state that Exhibits A, B, C, D, E, and F are preliminary drafts that "necessarily [represent] the advice, opinion, and recommendation of the drafter with regard to the form and content of the final document." You additionally state that the study at issue was conducted by Applied at the request of the university and relates to the policymaking function of the university. Upon review of your arguments and the submitted information, we agree that Exhibits A, B, C, D, E, and F consist of draft policymaking documents that the university may withhold pursuant to section 552.111 of the Government Code.

You also seek to withhold Exhibit G under section 552.111. Exhibit G contains correspondence that appears to be from a member of the public to the university offering opinions on the possible branding. You indicate that because Exhibit G involves "opinions, advice and recommendations regarding a university logo or brand" it relates to a policymaking function of the university and therefore is excepted from disclosure under section 552.111. However, we find that the university has not demonstrated that Exhibit G reflects a communication between the university and a party with which it shares a privity of interest for purposes of section 552.111. *See* Open Records Decision No. 561 at 9 (1990) (determining that section 552.111 is not applicable to communications with third party with which governmental body has no privity of interest or common deliberative process). Therefore, no portion of Exhibit G may be withheld on the basis of section 552.111.

Exhibit G does contain an e-mail address, which you argue is excepted from disclosure under section 552.137 of the Government Code. This section 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 that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Therefore, the university must withhold this e-mail address in accordance with section 552.137 unless the university receives consent for its release.

We finally consider your argument under section 552.110 of the Government Code for the remaining information. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup>

You state that the "university believes the survey instrument prepared by [Allied] that is the subject of this request, including the questions and the manner in which the responses are compiled and analyzed, is excepted from disclosure under section 552.110 as a trade secret." You further state that "the questions and pattern in which they are asked of the survey group represent the competitive advantage [Applied] has over others who do not know of the questions and pattern," and additionally, that "the competitive advantage continues to exist even though individuals who participated in the survey read and answered the questions." This office will accept a claim that information is excepted from disclosure if a *prima facie* case is made that it is a trade secret, and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 (1991). However, the university has not

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<sup>3</sup>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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

made such a *prima facie* case, and Applied has provided no arguments to this office in support of a claim that the information at issue is a trade secret. *See* Gov't Code § 552.305(d)(2)(B) (allowing interested third party ten days after the date of its receipt of 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); Open Records Decision No. 402 (1983). Therefore, none of the submitted information may be withheld as a trade secret under section 552.110(a).

Section 552.110(b) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). As of the date of this decision, Applied has not submitted to this office any reasons explaining why its information should not be released. Therefore, this party has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b). Nor has the university established that any of the submitted information is excepted under section section 552.110(b).

We note, however, that Exhibit H is protected by copyright law.<sup>4</sup> A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the university may withhold Exhibits A, B, C, D, E, and F pursuant to section 552.111. The e-mail address we have marked in Exhibit G must be withheld under section 552.137. The remaining information must be released. In releasing information that is protected by copyright, the university must comply with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

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<sup>4</sup>We note that the university references Exhibit H in its argument under trade secret. It is not clear from the submitted information whether Exhibit H is submitted as responsive to the request or as support for the university's trade secret argument. To the extent that Exhibit H is not responsive to the request for information, it need not be released to the requestor. However, if Exhibit H is responsive to the request, then it must be released in accordance with this ruling.

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

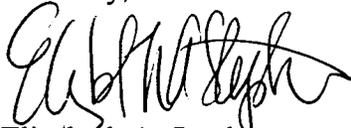
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Elizabeth A. Stephens  
Assistant Attorney General  
Open Records Division

EAS/krl

Ref: ID#222025

Enc. Submitted documents

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