



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2010

Ms. Erin K. Stewart
Assistant General Counsel
University of North Texas System
1901 Main Street, Suite 216
Dallas, Texas 75201-5222

OR2010-06608

Dear Ms. Stewart:

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# 378663 (UNT PIR No. 10-096).

The University of North Texas (the "university") received two requests from two different requestors for letters, e-mails, and correspondence between two named individuals during a specified time period.¹ You state that you have released some information to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.111, 552.116, 552.117, 552.1235, 552.136, and 552.137 of the Government Code.² Additionally, you state that the release of a portion of the submitted information may implicate the proprietary interests of FirstSouthwest. Accordingly, you state and provide documentation showing that you have notified FirstSouthwest of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to

¹We note that one of the requestors later clarified his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you also initially raised sections 552.104 and 552.131 of the Government Code as exceptions to disclosure, you did not submit to this office written comments stating the reasons why these sections apply to the submitted information. Therefore, we assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative samples of information.³

Initially, we note 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, FirstSouthwest has not submitted any comments to this office explaining how release of Representative Sample 5 would affect its proprietary interests. Accordingly, none of Representative Sample 5 may be withheld based on FirstSouthwest's proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). As you raise no further exceptions to disclosure for this information, it must be released.

Next, you state portions of Representative Sample 1 are confidential under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutes that make information confidential. You assert the W-9 form in Representative Sample 1 is confidential under section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26

³We 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.

U.S.C. § 6103(b)(2)(A). W-9 forms are requests for taxpayer identification numbers, and do not fall within the definition of "tax return information." As such, the university may not withhold the submitted W-9 form under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. As you raise no further exceptions to disclosure for this information, it must be released.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990); and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). We note that the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we agree that some of the remaining information you have marked in Representative Sample 1 is protected under common-law privacy; therefore, the university must withhold the information we have marked on that basis under section 552.101 of the Government Code. However, we find none of the remaining information you have marked under common-law privacy is intimate or embarrassing and of no legitimate public interest; thus, none of it may be withheld under section 552.101 in conjunction with common-law privacy. As you raise no further exceptions to disclosure of this information, it must be released.

You assert that some of the information in Representative Sample 2 is subject to section 552.103 of the Government Code. Section 552.103 provides 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.

...

(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 that the section 552.103(a) exception 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, no pet.); *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 under section 552.103(a).

You state prior to the commission's receipt of the present request, Highland Campus Health Group, L.P. ("Highland") and the university were opposing parties in a dispute before the State Office of Administrative Hearings (the "SOAH"). We note such contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). You further state that although Highland has withdrawn its claim before the SOAH, it has done so without prejudice and has reserved the right to refile. You inform us the dispute at issue arose from an alleged breach of a contract between Highland and the university. You also indicate the information you have marked in Representative Sample 2 relates to the dispute at issue. After reviewing your arguments and the submitted information, we agree that based on the totality of the circumstances, the university reasonably anticipated litigation on the date it received the instant request for information. Furthermore, we find the submitted information relates to the anticipated litigation for purposes of section 552.103(a). Thus, the university may generally withhold the information it has marked in Representative Sample 3 under section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further,

the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 must provide 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 "for the purpose of facilitating 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 Texas 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). 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.*, meaning it was "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).

Whether a communication is protected 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, no pet.). 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 the governmental body otherwise waives the privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state that the portions of Representative Sample 4 you have marked consist of communications made for the purpose of facilitating legal services and that the communications are exclusively between university lawyers, university employees, and university consultants, each of whom you have identified. You state these communications were made in confidence and the university has maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the information you have

marked constitutes privileged attorney-client communications the city may withhold under section 552.107 of the Government Code.

Next, we address your assertion that certain portions of Representative Samples 6 and 9, which you have marked, are excepted from disclosure under the deliberative process privilege encompassed by section 552.111. *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, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that 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* Open Records Decision No. 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded that 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.

You assert that the information at issue reflects the frank and open deliberations between university employees and officials acting in policy-making functions, including the potential adoption of an owner-controlled insurance program, funding matters relating to new university programs or institutions, development of the university's research park, strategic

planning relating to the achievement of Tier One status, the establishment of a risk assessment, and the development of a public relations strategy. You further assert that portions of Representative Samples 3 and 6 consist of draft documents between university employees that we understand are subject to release in their final form. Based on your representations and our review of the information at issue, we find that you have established the deliberative process privilege is applicable to most of the information and draft documents you have marked in Representative Samples 3, 6, and 9. Accordingly, the university may withhold this information under section 552.111 of the Government Code.⁴ However, we find some of the information at issue, which we have marked, consists either of general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the remaining information does not reflect on its face, that it reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find none this information is excepted from disclosure under section 552.111, and it may not be withheld on that basis. As you raise no further exceptions to disclosure of this information, which we have marked, it must be released.

Section 552.105 of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the university is currently negotiating multiple acquisitions of real property that will be used for a public purpose and for which no final award of contracts have been made. Further, you assert, in good faith, that disclosing the information at issue would damage the

⁴As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

university's negotiating position with respect to these acquisitions. Based on your representations and our review, we conclude the university may withhold the remaining information in Representative Sample 3 under section 552.105 of the Government Code.

You claim a part of Representative Sample 7 is subject to section 552.116 of the Government Code. Section 552.116 provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform this office that the information you have marked in Representative Sample 7 consists of the audit working papers of an internal audit conducted by the university's System Internal Audit Office. You further inform us, and provide documentation showing, that the audit in question was authorized by the university's Board of Regents through rule 04.500 of the Rules of the Board of Regents of the University of North Texas. Based on your representations and our review of the documents at issue, we agree that the information you have marked in Representative Sample 7 consists of audit

working papers as defined in section 552.116(2). Accordingly, the university may withhold this information under section 552.116 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). You state Representative Sample 8 contains the personal information of employees who timely requested confidentiality under section 552.024, which you have marked. Accordingly, the university must withhold this information under section 552.117(a)(1) of the Government Code. We have marked additional information in Representative Sample 1 that may be subject to section 552.117(a)(1). Thus, to the extent the employee to whom this information pertains timely requested confidentiality under section 552.024, the university also must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code.

You assert portions of Representative Sample 9 are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Upon review, we agree some of the information you marked constitutes access device numbers under section 552.136. Accordingly, the university must withhold this information, which we have marked, under section 552.136 of the Government

Code. However, we find you have failed to demonstrate the remaining information you have marked constitutes access device numbers that can be used alone or in conjunction with another access device to obtain money, goods, services, or another thing of value or can be used to initiate a transfer of funds. Accordingly, the university may not withhold the remaining information it has marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked in Representative Sample 11, and the additional e-mail addresses we have marked in Representative Sample 10, do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. Therefore, the university must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the city has received consent for their release.⁵ We note you have marked information in Representative Sample 11 under section 552.137 that is not an e-mail address. Accordingly, the university may not withhold this information under section 552.137.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university may withhold the information it has marked under section 552.103 of the Government Code. The university may withhold the information it has marked under section 552.107 of the Government Code. With the exception of the information we have marked for release, the university may withhold the information it has marked under section 552.111 of the Government Code. The university may withhold the remaining information it has marked under section 552.105 of the Government Code. The university may withhold the information it has marked under section 552.116 of the Government Code. The university must withhold the information it has marked under section 552.117 of the Government Code, and must withhold the additional information we have marked under section 552.117 to the extent it applies to an individual who timely requested confidentiality under section 552.024 of the Government Code. The university must withhold the information we have marked under section 552.136 of the Government Code. The university must withhold the e-mail addresses marked under section 552.137 of the Government Code. The remaining information must be released to the requestor.

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including access device numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 378663

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Mary Williams
FirstSouthwest
Senior Vice President, Public Finance
North St. Paul Street, Suite 800
Dallas, Texas 75201
(w/o enclosures)