



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2010

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

OR2010-06948

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#379437 (UNT PIR No. 10-109):

The University of North Texas (the "university") received a request for memorandums, e-mails, or other communications between two named individuals pertaining to specified topics, as well as documents related to a shared services agreement, including copies of the initial RFP for a consultant's study and the submitted bids.¹ You state you will provide some of the responsive information to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.117, and 552.137 of the Government Code. Although you take no position on whether the requested bids are excepted from disclosure, you state release of this information may implicate the proprietary interests of interested third parties. Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. See Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should

¹You state and provide documentation showing that the requestor amended the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from two third parties, Pappas Consulting Group and Agile 1. We have considered the exceptions you claim, as well as the third party arguments, and reviewed the submitted information, a portion of which consists of a representative sample.²

Section 552.107(1) of the Government Code protects information that comes 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 “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). 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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 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 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, 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

²We 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.

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).

You state that the information you have marked in Representative Sample 1 constitutes communications between attorneys retained by the university and university employees that were made for the purpose of providing legal advice to the university. You state further that these communications were made in confidence and have 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 university may withhold the information you have marked under section 552.107 of the Government Code.

Section 552.111 excepts from disclosure "an 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, recommendations, and opinions 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, 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, and opinions that reflect 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. The 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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).

You state the information you have marked in Representative Sample 2 reflects frank and open deliberations among UNT System and university officials regarding the potential adoption of an owner controlled insurance program. You further state that all of the individuals who participated in these communications were in policy-making positions by nature of their official responsibilities or by nature of their appointment to advisory bodies.

As such, you contend they were exercising their policy-making responsibility during the time of these communications. Based on these representations and our review, the university may withhold the information you have marked under section 552.111 of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided 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 telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You have marked two telephone numbers in Representative Sample 3. Although you assert the employees whose information is at issue have elected to keep their personal information confidential, you do not inform our office that the elections were made prior to the university's receipt of the request. Therefore, to the extent the employees at issue timely elected to keep their personal information confidential, the university must withhold the telephone numbers you have marked under section 552.117(a)(1); however, the university may only withhold the marked personal cellular telephone number if the number is not paid for by the university. Conversely, to the extent the employees did not make timely elections under section 552.024, the university may not withhold any portion of the marked information under section 552.117(a)(1).

You claim the e-mail addresses you have marked are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 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 id.* § 552.137(a)-(c). You state you have not received consent to release the e-mail addresses you have marked. Therefore, we agree the university must withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code.³

Next, we address the submitted bid proposals. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Pappas Consulting Group and Agile 1. Therefore, we have no basis to conclude the remaining fifteen parties have

³We 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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

protected proprietary interests in their submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, the university may not withhold these proposals on the basis of any proprietary interest. We will, however, consider arguments raised by Pappas Consulting Group and Agile 1 under section 552.110 of the Government Code.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret 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.” *See Gov’t Code* § 552.110(a)-(b).

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)* (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).

Pappas Consulting Group asserts information contained in its bid pertaining to its client list, marketing, research and development, and pricing is excepted under section 552.110(b). Upon review of the submitted arguments, we find Pappas Consulting Group has established its pricing information constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. However, Pappas Consulting Group publishes the identities of its clients on its website. Thus, Pappas Consulting Group has failed to demonstrate that its release of its client list and client information would cause the company substantial competitive harm. In addition, we find that Pappas Consulting Group has failed to demonstrate how release of the remaining information at issue would cause the company substantial competitive harm. The university must therefore withhold the pricing information, which we have marked, in Pappas Consulting Group’s bid proposal under section 552.110 of the Government Code. The remaining bid information for Pappas Consulting Group must be released.

Agile 1 asserts its client contact information is excepted under section 552.110(b) of the Government Code. Upon review, we find that Agile 1 has made a specific factual or evidentiary argument showing that release of its client contact information, which it has acquired from its customers under confidentiality agreements, would cause it substantial competitive harm. Therefore, the university must withhold this client information, which we have marked, under section 552.110(b) of the Government Code. The remaining bid information for Agile 1 must be released.

We note that some of the bid proposals are protected by copyright. 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). Thus, any copyrighted information may only be released in accordance with copyright law.

In summary: 1) the university may withhold the information you have marked pursuant to section 552.107 of the Government Code; 2) the university may withhold the information you have marked pursuant to section 552.111 of the Government Code; 3) to the extent the employees at issue timely elected to withhold their personal information, the university must withhold the information you have marked pursuant to section 552.117 of the Government Code; 4) the university must withhold the personal e-mail addresses you have marked pursuant to section 552.137 of the Government Code; 5) the university must withhold the pricing information of Pappas Consulting Group pursuant to section 552.110 of the Government Code; 6) the university must withhold the client contact information of Agile 1 pursuant to section 552.110 of the Government Code. The remaining information must be released. However, the copyrighted portion of the information at issue may only be released in accordance with copyright law.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/jb

Ref: ID#379437

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jeff Bienstock
RCM Technologies
9 Polito Avenue
Lyndhurst, New Jersey 07071
(w/o enclosures)

Mr. J. Kent Caruthers
Senior Partner
MGT of America, Inc.
2123 Centre Point Boulevard
Tallahassee, Florida 32308
(w/o enclosures)

Alceste T. Pappas, Ph.D.
President and CEO
Pappas Consulting Group
One Stamford Landing, Suite 116
68 Southfield Avenue
Stamford, Connecticut 06902
(w/o enclosures)

Ms. Jennifer Daniels
Ernst and Young
2100 Ross Avenue, Suite 1500
Dallas, Texas 75201
(w/o enclosures)

Ms. Cynde Coulson
Managing Director
Resources Global Professionals
JP Morgan Chase Tower
220 Ross Avenue, Suite 3280
Dallas, Texas 75201
(w/o enclosures)

Mr. Elliot Haugen
Kaludis Consulting Group, Inc.
1730 M Street, NorthWest Suite 600
Washington, DC 20036
(w/o enclosures)

Mr. Ryan M. Coates
Vice President
The North Highland Company
14180 Dallas Parkway, Suite 200
Dallas, Texas 75254
(w/o enclosures)

Mr. Paul Glogowski
Hay Group, Inc.
5001 West Spring Valley Road, Suite 800W
Dallas, Texas 75244
(w/o enclosures)

J. Voloudakis
Huron Consulting Group
470 Atlantic Avenue, 14th Floor
Boston, Massachusetts 02210
(w/o enclosures)

Ms. Cynthia Smith
Farr Systems, Inc.
4835 LBJ Tower I, Suite 1000, 10th Floor
Dallas, Texas 75244
(w/o enclosures)

Mr. Greg Hatch
Alvarez & Marsal
700 Louisiana Street, Suite 900
Houston, Texas 77002
(w/o enclosures)

Mr. Bret Bass
Agile 1
1999 West 190th Street
Torrance, California 90504
(w/o enclosures)

Mr. David Hemingson
Bearing Pint, Inc.
1676 International Drive
McLean, Virginia 22102
(w/o enclosures)

Mr. Clinton E. Davies
Berry, Dunn, McNeil & Parker
100 Middle Street
Portland, Oregon 04101
(w/o enclosures)

Mr. Gary Somers
Cedar Crest One
1255 Alderman Drive
Alpharetta, Georgia 30005
(w/o enclosures)

Mr. Bill Varney
eBridge Consulting
1235 South Main Street, Suite 252
Grapevine, Texas 76051
(w/o enclosures)

Mr. Glenn Davidson
EquaTerra, Inc.
700 Twelfth Street, NorthWest, Suite 700
Washington, D.C. 20005
(w/o enclosures)