



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2010

Mr. R. Brooks Moore
Assistant General Counsel
Office of the General Counsel
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2010-15044

Dear Mr. Moore:

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# 396243 (TAMU 10-367).

Texas A&M University (the "university") received a request for any document from the athletic department regarding the conference realignment situation. You indicate the university will release some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also believe that the submitted information may implicate the interests of the Big 12 Conference (the "Big 12"). You inform us that the Big 12 was notified of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from an attorney for the Big 12.² We have considered the submitted arguments and reviewed the submitted information.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we understand the Big 12 to contend that the submitted information is not subject to disclosure under the Act. Section 552.021 of the Government Code provides for public access to “public information,” *see* Gov’t Code § 552.021, which is defined by section 552.002 of the Government Code as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). We understand the Big 12 to contend that its communications with the members of the Big 12’s board of directors, in their capacities as members of the board, were not collected, assembled, or maintained in connection with the transaction of any official business of the university. Having considered the Big 12’s arguments and reviewed the information at issue, we find that the information we have marked was not “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. Gov’t Code § 552.002; *see* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude that the marked information is not subject to the Act and need not be released in response to the instant request for information.³

We also understand the Big 12 to contend that the remaining information is not subject to the Act because the information was generated by the Big 12, which is not a governmental body subject to the Act. *See* Gov’t Code § 552.003(1)(A) (defining “governmental body”). We note, however, that the remaining information at issue was sent to university administrators and is in the university’s possession. Moreover, the university has submitted this information as being subject to the Act. We find that the university collected, assembled, or maintains this information in connection with the transaction of its official business. We therefore conclude that the remaining information is subject to the Act and must be released, unless the Big 12 or the university demonstrates that the information falls within an exception to disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, the university indicates that some of the requested information also was responsive to several previous requests for information. Accordingly, some of the requested information may have been the subject of previous requests for rulings, in response to which this office issued Open Records Letter Nos. 2010-12031 (2010), 2010-12894 (2010), 2010-13007 (2010), 2010-13010 (2010), 2010-13678 (2010), 2010-13730 (2010) and 2010-14109 (2010). We have no indication of any change in the law, facts, or circumstances on which these prior

³As we are able to make this determination, we need not address the Big 12’s other arguments against disclosure of the marked information.

rulings were based. Accordingly, we conclude the university must continue to withhold or release any information responsive to the present request that is encompassed by the previous rulings in accordance with Open Records Letter Nos. 2010-12031, 2010-12894, 2010-13007, 2010-13010, 2010-13678, 2010-13730, and 2010-14109.⁴ *See* Open Records Decision No. 673 at 6-7 (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, we note that the university and the Big 12 now seek to withhold information encompassed by the previous rulings under sections 552.104 and 552.111 of the Government Code. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Sections 552.104 and 552.111, which the university and the Big 12 now claim, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 could be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 could be waived). As such, sections 552.104 and 552.111 neither prohibit public disclosure of information nor make information confidential under law. Therefore, any submitted information that we previously ruled must be released may not now be withheld under section 552.104 or section 552.111. We note, however, that the Big 12 also claims sections 552.110, 552.131, and 552.137 of the Government Code. Because those exceptions are confidentiality provisions for purposes of section 552.007, we will consider the Big 12's claims under sections 552.110, 552.131(a), and 552.137 for the information we previously ruled must be released.

Section 552.110 of the Government Code protects a third party's proprietary interests with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause

⁴As we are able to make this determination, we do not address the university's and the Big 12's arguments to the extent any of the responsive information was encompassed by the previous rulings.

substantial competitive harm to the person from whom the information was obtained.” 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).

We understand the Big 12 to claim that section 552.110(b) is applicable to the remaining information. Having considered its arguments, we find that the Big 12 has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the Big 12 substantial competitive harm. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We therefore conclude that the university may not withhold any of the remaining information under section 552.110 of the Government Code.

Section 552.131(a) of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

Gov’t Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORD 552, 661. The Big 12 does not contend, and thus has not demonstrated, that any of the remaining information constitutes a trade secret under section 552.110(a). As previously concluded, the Big 12 has not demonstrated that section 552.110(b) is applicable to any of the remaining information. We therefore conclude that the university may not withhold any of the remaining information under section 552.131(a) 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* Gov't Code § 552.137(a)-(c). We note that section 552.137 is also not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses of members of the public in the remaining information that are not specifically excluded by section 552.137(c). Therefore, the university must withhold the e-mail addresses we have marked under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.⁵ We note that the remaining e-mail addresses you have marked are not protected under section 552.137 and may not be withheld on that basis.

Finally, we note that some of the remaining information bears notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the information we have marked is not subject to the Act and need not be released in response to the instant requests for information. The university must continue to withhold or release any information responsive to the present request that is encompassed by our previous rulings in accordance with Open Records Letter Nos. 2010-12031, 2010-12894, 2010-13007, 2010-13010, 2010-13678, 2010-13730, and 2010-14109. The e-mail addresses we have marked in the remaining information must be withheld under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The remaining information must 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

⁵We note that 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, without the necessity of requesting an attorney general decision.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 396243

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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