



ATTORNEY GENERAL OF TEXAS
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Ms. Ruth E. Shapiro
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University of Houston System
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OR2011-00417

Dear Ms. Shapiro:

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# 405337.

The University of Houston System (the "system") received a request for all correspondence between system employees and officials related to and involving any business and transactions between the University of Houston and Rice University ("Rice") regarding the sale, lease, or other business arrangement related to the radio station KTRU, its transmitter, any land surrounding KTRU and/or its transmitter and the sale of said land and transmitter; all payments made to Public Radio Capital ("PRC"), including invoices and check stubs noting duties performed by PRC; and all correspondence with PRC.¹ You state the system has redacted e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² As permitted by section 552.024(c) of the Government Code, we also understand that you will redact information subject to

¹You state the system received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Open Records Decision No. 684 is a previous determination issued to all governmental bodies, which authorizes withholding of ten categories of information, including 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.

section 552.117 of the Government Code.³ You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.105 and 552.111 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure.⁴ Additionally, although you raise no exceptions to the disclosure of information relating to payments to PRC and the final contracts with PRC, you state release of this information may implicate PRC's proprietary interests. Accordingly, pursuant to section 552.305 of the Government Code, you notified PRC of the request and of its right to submit arguments to this office as to why its 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). PRC submitted comments. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁵ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor specifically excluded from his request identifiable donor information. Thus, any such information is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the system is not required to release that information in response to the request.

³Section 552.117 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. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.117, .024(c).

⁴Although you also raised sections 552.101 and 552.104, you have not submitted to this office written comments stating the reasons why these sections would allow the information to be withheld. Thus, the system has waived its claim under section 552.104. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Further, the system has not demonstrated that any of the submitted information is confidential for purposes of section 552.101. *See* Gov't Code §§ 552.301, .302. In addition, although you raise section 552.022 of the Government Code, we note that section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See id.* § 552.022.

⁵We 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.

Section 552.105 of the Government Code excepts from disclosure information relating to the following:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) 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. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under section 552.105, 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 in regard to particular transactions is a question of fact. Thus, 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 that the information in Exhibit 7 pertains to the valuation of the license and signal of KTRU, appraisals of KTRU and the related real property, and proposed business plans for KTRU, which were used to determine the feasibility of the acquisition of the station by the system from Rice. You state that this information pertains to a sale that has not yet been completed. Although Rice and the system have signed an initial agreement, you state that the transaction is not yet final. You explain that the public comment period for the assignment of KTRU's Federal Communications Commission license is currently in effect and that the Texas Higher Education Coordinating Board has not yet approved the transaction. Further, you state the system has made a good-faith determination that release of the information in Exhibit 7 will impair the system's position in this transaction. Accordingly, we conclude the system may withhold Exhibit 7 under section 552.105 of the Government Code.⁶

Section 552.111 of the Government Code 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, opinion, and recommendation in the decisional process

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, opinions, and other material reflecting 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. 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). Further, 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).

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.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (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), 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). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111

is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You assert that portions of the remaining information consist of advice, recommendations, and opinions of system employees and officials and consultants for the system for policymaking purposes. You state that the communications pertain to the financial and operational feasibility of the system's purchase of KTRU, the system's negotiations of the transaction, the preparation of the Asset Purchase Agreement for the purchase, and the preparation for the administrative litigation that may ensue while the FCC application is pending. You have identified the parties to the communications as employees and officials of the system and employees of a third party consultant, PRC. You assert the system and PRC share a privity of interest because the system retained PRC to assess and provide advice regarding various aspects of the transaction. Based on your representations, we conclude that the system and PRC share a privity of interest with regard to the submitted information. You further state that portions of the remaining information consist of drafts of meeting agendas, contracts, and agreements that will be or have been released in their final form to the public. Based on your representations and our review, we find the information we have marked consists of advice, opinions, and recommendations regarding a policymaking matter of the system that were communicated within the system and between the system and PRC. Accordingly, the system may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information consists of general administrative information that does not relate to policymaking or information that is purely factual in nature. Further, we note that a portion of the remaining information consists of communications with a consultant retained by Rice. We find that you have not established that the system shares a privity of interest or common deliberative process with this party. Thus, you have failed to demonstrate, and the information at issue does not reflect on its face, that the remaining information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, the remaining information is not excepted from disclosure under section 552.111 and it may not be withheld on that basis.

We now turn to PRC's arguments under section 552.110 against the disclosure of its payment information, which is contained in Exhibit 4. 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 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.⁷ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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]ommercial 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

⁷The 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;
- (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).

result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999).

Upon review, we find PRC has failed to demonstrate that its payment information meets the definition of trade secret, nor has it established a trade secret claim for this information. *See* Open Records Decision Nos. 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 402. We note that information, including pricing information, pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process for continuous use in the operation of the business. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 306 at 3. Therefore, none of PRC's payment information may be withheld under section 552.110(a).

We also find that PRC has made only conclusory allegations that the release of any of its payment information would result in substantial damage to its competitive position. *See* Open Records Decision Nos. 661 (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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Furthermore, we note that the payment information relates to the price charged under a contract between the system and PRC. This office considers the prices charged in government contract awards to be a matter of strong public interest, and thus, this information is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, none of the information in Exhibit 4 may be withheld under section 552.110(b). As no further exceptions to the disclosure of this information have been raised, the system must release the information in Exhibit 4.

In summary, the system may withhold the information in Exhibit 7 under section 552.105 of the Government Code. The system may withhold the information we have marked under section 552.111 of the Government Code. The remaining responsive information must be released to the requestor.

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 405337

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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