



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2011

Ms. Neera Chatterjee
Office of General Counsel
University of Texas System
201 East Seventh Street
Austin, Texas 78701-2902

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2011-13336

Dear Ms. Chatterjee:

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# 430170 (ORR# 138290).

The University of Texas at Austin (the "university") received a request for eleven categories of specified information, including information related to licensing, the Collegiate Licensing Company ("CLC"), and a named individual. You state the university "is handling the release of" some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You do not take a position as to whether the remaining submitted information is excepted from disclosure under the Act. However, you state you notified the following interested third parties of the university's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: CLC; College Concepts, L.L.C. ("College Concepts"); Dallas Cowboys Merchandising; Knights Apparel, Inc. ("Knights"); Northwest Company L.L.C.; Outdoor Cap Company ("Outdoor Cap"); Outer Stuff Ltd.; Top of the World; University Co-Operative Society; and VF Licensed Sports Group ("VF").¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). In correspondence to this office, College Concepts, Knights, and VF assert some of the information at issue is excepted from disclosure under section 552.110 of the Government Code. Although Outdoor Cap

¹You inform us Knights and VF entered into contracts with the university.

submitted correspondence to this office regarding the request for information, it did not submit any arguments objecting to the release of its information. *See* Gov't Code § 552.305. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note VF has submitted to this office information it asserts is excepted from release under section 552.110 of the Government Code. However, the university did not submit this information for our review. This ruling does not address information beyond what the university has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the university submitted as responsive to the request for information. *See id.*

Next, Knights asserts it submitted its information to the university “for the sole purpose of seeking a licensing arrangement with the [u]niversity, and with no expectation that it would be shared with the public.” However, we note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, the university must release it, notwithstanding any expectations or agreement specifying otherwise.

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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, CLC, Dallas Cowboys Merchandising, Northwest Company L.L.C., Outer Stuff Ltd., Top of the World, and University Co-Operative Society have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, and the university may not withhold any portion of the submitted information on that basis. *See* ORD 661 at 5-6, 552 at 5, 542 at 3.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

The university asserts some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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 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 Tex. 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, 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 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 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 explain the information you have marked under section 552.107 constitutes confidential communications between attorneys for and staff of the university that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree the information you have marked under section 552.107 constitutes privileged attorney-client communications. Therefore, the university may withhold the information you have marked under section 552.107.

You assert some of the remaining information is excepted from disclosure under section 552.111 of the Government Code, which 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.” 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 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 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 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 (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), 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.

You assert the information you have marked under section 552.111 includes drafts and communications regarding strategy and negotiation related to university licensing, royalties, and trademark policies. You state "CLC and the [u]niversity work together pursuant to a formal agreement whereby CLC performs services relating to the licensing of the [u]niversity's marks, the collection of royalties, and the administration of the relevant trademark policy." You also explain "CLC and the University work together to fulfill these duties and thus share a common deliberative process as well as a privity of interest with regards to the marked information[.]" Thus, you assert the university has a privity of interest with CLC. You inform us some of the information at issue consists of communications with CLC and argue these "communications relate to various policymaking matters regarding the [u]niversity's marks, the collection of royalties and the administration of the relevant trademark policy." Based on your representations and our review of the information at issue, we find the university has demonstrated the applicability of section 552.111 to portions of the information at issue, which we have marked. Accordingly, the university may withhold the information we have marked under section 552.111 of the Government Code. However, we find you have not established the remaining information at issue consists of advice, opinion, or recommendation. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information and the university may not withhold it under section 552.111 on that ground.

As noted above, College Concepts, Knights, and VF assert some of the information at issue is excepted from disclosure 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: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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); *see also Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See Open Records Decision No. 402 (1983)*. We also note 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 or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); ORD 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[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." 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 requested information. *See Open Records Decision No. 661 at 5-6 (1999)* (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See Open Records Decision Nos. 514 (1988)* (public has interest in knowing prices charged by government contractors), 319 at 3

³The following are the six factors that the Restatement gives 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 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; *see also Open Records Decision Nos. 319 at 2 (1982)*, 306 at 2 (1982), 255 at 2 (1980).

(information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514.

We find Knights has established the release of some of the information at issue would cause it substantial competitive injury. Therefore, the university must withhold this information, which we have marked, under section 552.110(b). However, we find College Concepts, Knights, and VF have made only conclusory allegations that release of the remaining information at issue would cause these companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b). In addition, we conclude VF has failed to establish a *prima facie* case that any of its information is a trade secret. *See id.* § 552.110(a); ORD 402. Thus, the university may not withhold any of the remaining information under section 552.110(a) or (b).

Finally, we note some of the materials at issue may be 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. Open Records Decision No. 180 at 3 (1977). 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.

To conclude, the university may withhold the information you have marked under section 552.107 of the Government Code and the information we have marked under section 552.111 of the Government Code. The university must withhold the information we have marked under section 552.110 of the Government Code. The university must release the remaining information, but any copyrighted information 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 430170

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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AUG 27 2014

At 1:50 P.M.
Amalia Rodríguez-Mendoza, Clerk

Cause No. D-1-GN-11-003043

VF IMAGEWEAR, INC.,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
FOR THE STATE OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT
§
§
§ 98th JUDICIAL DISTRICT
§
§
§ TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff VF Imagewear, Inc. ("VF Imagewear") and Defendant Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff VF Imagewear to challenge Letter Ruling OR2011-13336 (the "Ruling"). The University of Texas at Austin (UT Austin) received a request from Justin Pentz on behalf of Dechert, LLP (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain documents submitted to UT Austin by VF Imagewear. These documents contain information designated by VF Imagewear as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("VF Imagewear Information"). UT Austin requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of the VF Imagewear Information. UT Austin holds the information that has been ordered to be disclosed.

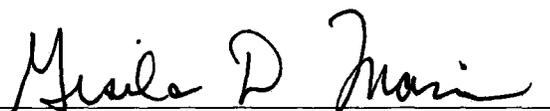
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing

voluntarily withdrawn the request for information, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

1. Because the request was withdrawn, no information should be released in reliance on Letter Ruling OR2011-13336. Letter Ruling OR2011-13336 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 45 days of the signing of this Final Judgment, the Office of the Attorney General shall notify UT Austin in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall instruct UT Austin that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2011-13336 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any information in reliance on said Ruling, and if UT Austin receives any future requests for the same or similar VF Imagewear information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2011-13336.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on August 27, 2014.

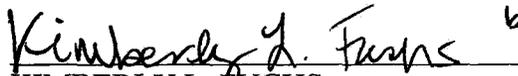

JUDGE PRESIDING

AGREED:



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 *by permission ERH*

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