



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2011

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845

OR2011-15697

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# 434228 (TAMU 11-460).

Texas A&M University (the "university") received a request for all records, including telephone logs, for a specified two-day time period regarding communications to or from the university athletic director. You state the university will provide some of the requested information to the requestor. Although you state the university takes no position with respect to the public availability of the submitted e-mail string, you state its release may implicate the proprietary interests of The Big 12 Conference, Inc. (the "Big 12"). Accordingly, you state, and provide documentation showing, the university notified the Big 12 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 statutory predecessor to 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 received comments from the Big 12. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the individual e-mail messages in the submitted e-mail string were not created during the time period specified in the request for information. Thus, this information, which we have marked, is not responsive to the request. This decision does not

address the public availability of the non-responsive information, and that information need not be released.

Next, the Big 12 argues the submitted information is not subject to 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). The Big 12 contends the submitted information is not subject to the Act because the information was generated by the Big 12, which is not a governmental body. We note, however, the information at issue was sent to the university’s athletic director and another university official, and is in the possession of the university. Furthermore, this information was collected, assembled, or maintained in connection with the transaction of the university’s official business, and the university has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and must be released, unless the Big 12 demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021.

The Big 12 argues some of the responsive information is confidential because the information is made confidential by contracts between the Big 12 and various third party television networks; release of the information would cause the Big 12 to be in breach of those contracts; and the Big 12 provided the information to the university with the expectation the information would remain confidential. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the information the Big 12 seeks to withhold comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The Big 12 claims the information at issue is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure “information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]” Gov’t Code § 552.107(1). Section 552.107(1), however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). As the university does not seek to withhold

any information pursuant section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to the information at issue. *See* ORD 676.

The Big 12 claims the information at issue is also excepted under section 552.110(b) of the Government Code, which 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; Open Records Decision No. 661 at 5-6 (1999).

The Big 12 argues the information at issue constitutes commercial and financial information that, if released, would cause the company substantial competitive harm. Upon review, however, we find the Big 12 has made only general conclusory assertions that release of the information at issue would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision No. 661 at 5-6 (stating to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm). Therefore, the university may not withhold the information at issue under section 552.110(b) of the Government Code.

The Big 12 claims the information at issue is also excepted under section 552.131 of the Government Code, which is applicable to economic development information and provides, in relevant part:

(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:

...

(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)(2). Section 552.131(a)(2) excepts from disclosure only “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)(2)

is co-extensive with that of section 552.110(b) of the Government Code. *See id.* § 552.110(b); ORD 661 at 5-6. As previously stated, the Big 12 has provided no specific factual or evidentiary showing release of its information at issue would cause the conference substantial competitive injury. Consequently, the university may not withhold the information at issue under section 552.131(a)(2) of the Government Code.

The Big 12 claims a specified e-mail address in the responsive information is excepted from disclosure under section 552.137 of the Government Code. This section 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). Section 552.137(c)(1) states an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent” is not excepted from public disclosure. *Id.* § 552.137(c)(1). In this instance, the e-mail address at issue belongs to a representative of the Big 12, which has contracted with the university. Because of the contractual relationship between the university and the Big 12, the e-mail address is specifically excluded by section 552.137(c)(1). Consequently, the university may not withhold the e-mail address at issue under section 552.137 of the Government Code. As no other exceptions to disclosure have been claimed for the submitted responsive information, the university must release this information.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 434228

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)