



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2011

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-16115

Dear Ms. Angadicheril:

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# 435055 (OGC# 139068).

The University of Texas at Austin (the "university") received a request for e-mails between three named university employees and eleven named individuals during a specified time period that include any of eight specified terms. You state you will redact e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim portions of the submitted information are excepted from disclosure under section 552.111 of the Government Code. You also inform us the submitted information may implicate the interests of third parties. Accordingly, you state the university notified the Big 12 Conference (the "Big 12") and the National Collegiate Athletic Association (the "NCAA") of the present request and their opportunity to submit arguments against disclosure of the information. *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 applicability of exception to disclose under Act in certain circumstances). We have

¹This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

received comments from the Big 12. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the NCAA has not submitted any comments to this office explaining how release of the submitted information would affect its proprietary interests. Accordingly, the university may not withhold any of the submitted information on the basis of the NCAA's proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating business enterprise claiming exception for commercial or financial information under section 552.110(b) must show by specific factual evidence release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret).

The Big 12 argues information relating to the Big 12 is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," 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." *See* Gov't Code §§ 552.021, 002(a).

The Big 12 contends the information at issue 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 president, men's athletic director, and women's athletic director 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 or the university demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Next, the Big 12 argues some of the submitted 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

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.

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). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 of the Government Code). Consequently, unless the Big 12’s information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The Big 12 claims some of the information at issue is excepted from disclosure under section 552.107(1) 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 to section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to the information at issue, and the university may not withhold any of the information on that basis. *See* ORD 676.

The Big 12 also claims some of the information at issue is excepted from disclosure 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; ORD 661 at 5-6.

The Big 12 argues some of the information at issue constitutes commercial and financial information that, if released, would cause the Big 12 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 generally* ORD 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 also 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 the information at issue would cause it substantial competitive injury. Consequently, the university may not withhold the information at issue under section 552.131(a)(2) of the Government Code.

The university claims the information you have marked is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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 consisting 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 argue the information you have marked pertains to internal deliberations between university employees, the commissioner of the Big 12, and representatives of other Big 12 member universities. You generally assert the university, the Big 12, and the other Big 12 member universities share a common deliberative process, as well as a privity of interest, with regard to the remaining information at issue. You have not, however, explained how the representatives of the Big 12 or the other member universities, in this instance, are involved in the university's policymaking process or have policymaking authority regarding university matters. Therefore, we find you have failed to establish how the university shares a privity of interest or common deliberative process with the Big 12 or the other member universities with respect to the information at issue. Consequently, the information at issue is not excepted under the deliberative process privilege, and the university may not withhold it under section 552.111 of the Government Code. As you raise no further exception to disclosure, the university must release the submitted 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 435055

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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