



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2011

Mr. Ronny H. Wall
Associate General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409-2021

OR2011-17842

Dear Mr. Wall:

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# 437918.

Texas Tech University (the "university") received two requests from the same requestor for (1) all e-mails "mentioning RaiderPark Parking Garage" sent and received by eight named individuals; (2) all e-mails between the same eight named individuals and another named individual; and (3) all documents from the Red Raider Club that mention the RaiderPark parking garage. You state the university will provide some of the requested information to the requestor. You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.1235, 552.137, and 552.147 of the Government Code.¹ You also state release of some of the remaining requested information may implicate the proprietary interests of RaiderPark, L.P. ("RP") and the Texas Tech Alumni Association ("TTAA"). Accordingly, you state, and provide documentation showing, the university notified RP and TTAA of the request and of each company's right to submit arguments to this office as to why the information at issue 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 RP. We have considered the submitted arguments and reviewed the submitted representative sample of

¹Although you cite to sections 6103(a) of title 26 of the United States Code; 261.201 of the Family Code; 551.104 of the Government Code; 611.002 of the Health and Safety Code; and 159.002 and 1701.306 of the Occupations Code as examples of statutes encompassed by section 552.101 of the Government Code, you have not provided any arguments explaining how these statutes apply to the information at issue. Therefore, we do not address these statutes. *See* Gov't Code §§ 552.301, .302.

information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, RP seeks to withhold information the university has not submitted for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the university. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

You assert some of the requested information is excepted from disclosure under section 552.107(1) of the Government Code, which protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* 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. *See 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

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.

governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the information you have marked under section 552.107(1). You state the information consists of communications between university attorneys and university officials made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information you have marked under section 552.107(1) of the Government Code.³

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See Open Records Decision No. 455* (1987) (prescription drugs, illnesses, operations, and physical handicaps). You claim the information you have marked in the remaining information is protected by common-law privacy. Upon review, we find some of the information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate, however, how the remaining information you seek to withhold is highly intimate or embarrassing. Consequently, the university may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy. As you have not claimed any other exceptions to disclosure for that information, the university must release it.

You claim some of the remaining information 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).

³As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for portions of this information.

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.

This office also has concluded a preliminary draft of a document 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.

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 of the Government Code encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order 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 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 contend some of the remaining information, which you have marked or indicated, falls within the scope of section 552.111. You state the information at issue relates to

communications involving university officials and entities with which the university shares a privity of interest. You explain the university and those entities are working together pursuant to an executed lease agreement to provide additional parking to students, faculty, and visitors. You further explain the communications pertain to budgetary, marketing, and parking policymaking matters affecting the university and the entities in privity with the university. You also inform us the submitted draft documents have been or will be made available to the public in their final forms. Based on your representations and our review of the information at issue, we conclude the university may withhold the information we have marked under section 552.111 of the Government Code.⁴ We find, however, the remaining information at issue does not reveal advice, opinion, or recommendations that implicate the university's policymaking processes. Furthermore, some of the remaining information pertains to contract negotiations between the university and RP. Because the university and RP were negotiating a contract, their interests were adverse. Thus, we conclude the university and RP did not share a privity of interest or common deliberative process with respect to the information pertaining to contract negotiations. Consequently, the university may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024).* Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* The university may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

You seek to withhold university employees' cellular telephone numbers in the remaining information. You have not informed us, however, whether or not the employees timely chose to not allow public access to their personal information. Furthermore, you have not informed us whether or not they paid for their cellular telephone service. Therefore, if the employees timely requested confidentiality for their personal information and the cellular telephone numbers are the employees' personal cellular telephone numbers, the university

⁴As our ruling for this information is dispositive, we need not address RP's arguments against disclosure for portions of this information.

must withhold the cellular telephone numbers you have marked, and the additional number we have marked, pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely request confidentiality or the marked cellular telephone numbers are not personal cellular telephone numbers, the university may not withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code.

You claim the e-mail addresses you have marked in the remaining information are 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). Likewise, section 552.137 is 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. In this instance, some of the e-mail addresses you seek to withhold belong to representatives of RP, which has contracted with the university. Because of the contractual relationship between the university and RP, the e-mail addresses of the RP representatives are specifically excluded by section 552.137(c)(1). Furthermore, some of the e-mail addresses you seek to withhold are maintained by the university for some of its employees. Consequently, the university may not withhold these e-mail addresses under section 552.137 of the Government Code. The remaining e-mail addresses at issue, however, are not specifically excluded by section 552.137(c) and are not institutional, Internet website, or a governmental entity’s e-mail addresses. As such, the university must withhold these e-mail addresses, which we have marked, under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

RP claims some of the remaining information is excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *Id.* § 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 a “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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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.⁵ Open Records Decision No. 402 (1983).

Section 552.110(b) protects "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 § 552.110(b). This section 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.*; ORD 661 at 5-6.

RP claims its customer and contract negotiation information constitutes trade secrets under section 552.110(a). Upon review, we find RP has established its customer information, which we have marked, constitutes trade secrets and must be withheld under

⁵The 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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

section 552.110(a).⁶ We find, however, RP has not demonstrated how the contract negotiation information it seeks to withhold meets the definition of a trade secret. We note 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.” See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Consequently, the university may not withhold any of RP’s contract negotiation information under section 552.110(a) of the Government Code.

RP also claims its contract negotiation information constitutes commercial information that, if released, would cause the company substantial competitive harm. Upon review, we find RP has not demonstrated how release of its contract negotiation information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. 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 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). Consequently, the university may not withhold any of RP’s contract negotiation information under section 552.110(b) of the Government Code.

Section 552.1235 of the Government Code excepts the “name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an “institution of higher education” as “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” Educ. Code § 61.003(8). We agree the university qualifies as an “institution of higher education” under section 61.003 of the Education Code. Further, because section 552.1235 of the Government Code does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. See Gov’t Code § 311.005. “Person” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

You seek to withhold some of the remaining information, which you have marked, under section 552.1235. Upon review, however, you have failed to establish how any of the remaining information at issue identifies or tends to identify donors to the university.

⁶As our ruling for this information is dispositive, we need not address the university’s argument under section 552.1235 of the Government Code for this information.

Therefore, the university may not withhold any of the remaining information at issue under section 552.1235.

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 information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from TTAA explaining why any of the remaining information at issue should not be released. Therefore, we have no basis to conclude TTAA has protected proprietary interests in the information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, the university may not withhold any of the remaining information at issue on the basis of any proprietary interest TTAA may have in the information.

We note some of the remaining information 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. Accordingly, the university must release the remaining information in accordance with copyright law.

In summary, the university may withhold the information you have marked under section 552.107(1) of the Government Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university may withhold the information we have marked under section 552.111 of the Government Code. If the employees whose cellular telephone numbers are at issue timely requested confidentiality for their personal information and the marked cellular telephone numbers are the employees' personal cellular telephone numbers, the university must withhold the marked cellular telephone numbers pursuant to section 552.117(a)(1) of the Government Code. The university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the address owners have consented to the release of the addresses. The university must withhold RP's customer information we have marked under section 552.110(a) of the Government Code. The university must release the remaining information, but any information protected by copyright 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 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# 437918

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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