



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2011

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

OR2011-18842

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# 439894.

Texas Tech University (the "university") received a request for information sent or received by the university president or on his behalf during a specified time period that include any of twelve key terms. The university received a second request for all e-mail and text correspondence to and from any of three named university officials during a specified time period that discuss certain subject matters or that include any of four named individuals or officials from fourteen named universities, and all office and cellular telephone records for the three named university officials for a specified time period. You state you will release some of the information responsive to each of the requests. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.111, 552.117, and 552.137 of the Government Code. You also believe release of some of the requested information may implicate the interests of a third party. Accordingly, you state, and provide documentation demonstrating, the university notified the Big 12 Conference ("Big 12") of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). We have considered the exceptions you claim and

reviewed the submitted information. We have also received and considered comments submitted by an attorney for the Big 12.

Initially, the Big 12 contends some of the submitted information relating to the Big 12 is not subject to disclosure under 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). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). We understand the Big 12 to contend its communications with the members of the Big 12’s board of directors, in their capacities as members of the board, were not collected, assembled, or maintained in connection with the transaction of any official business of the university. Having considered the Big 12’s arguments and reviewed the information at issue, we find the information we have marked was not “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. Gov’t Code § 552.002; *see* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude the marked information is not subject to the Act and the university is not required to release this information in response to the instant requests for information.¹

We also understand the Big 12 to contend the remaining information is not subject to the Act because the information was generated by the Big 12, which is not a governmental body subject to the Act. *See* Gov’t Code § 552.003(1)(A) (defining “governmental body”). We note, however, the remaining information at issue was sent to university administrators and officials and is in the university’s possession. Moreover, the university has submitted this information as being subject to the Act. We find the university collected, assembled, or maintains this information in connection with the transaction of its official business. We therefore conclude the remaining information is subject to the Act and must be released, unless the information falls within an exception to disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, we must address the university’s obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not

¹As we are able to make this determination, we need not address the remaining arguments against disclosure of the marked information.

later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). You state the university received the first request for information on September 28, 2011. Because you do not inform this office the university was closed for business any days between September 28, 2011, and October 19, 2011, we find the university's fifteen-business-day deadline was October 19, 2011. Although you timely submitted to our office information responsive to the first request for information, we note some of the information you submitted for the second request was also responsive to the first request. However, you did not submit this information until November 7, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). As such, we find the university failed to comply with the requirements of section 552.301 as to this information, which we have marked.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise sections 552.104 and 552.111 of the Government Code for portions of the information at issue, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 (1991) (governmental body may waive statutory predecessor to section 552.104), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Thus, in failing to comply with section 552.301, the university has waived its arguments under section 552.104 and 552.111 for this information and may not withhold the information on these bases. However, because sections 552.117 and 552.137 provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the information at issue. We will also consider the exceptions you raise and the Big 12 raises for the remaining, timely submitted information that is subject to the Act.

The Big 12 argues some of the submitted information may not be released 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. However, information is not confidential under the Act 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 university raises section 552.104 of the Government Code for portions of the remaining information. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. This exception protects a governmental body’s interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert the university is a competitor in the marketplace for sources of revenue and the university must compete for distribution of the revenues with other Big 12 member institutions and with new and/or departing members of the Big 12. You state release of the information you have marked would give a decisive advantage to the other member institutions because the information reflects the university’s negotiating strategies. You further explain release of such information would place the university at a competitive disadvantage as the Big 12 renegotiates the existing revenue share agreements or bylaws due to recent departures from and additions to the Big 12. Thus, based on your representations and our review, we find, in this instance, the university has demonstrated it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104 with respect to information pertaining to revenue sharing agreements and Big 12 bylaws pertaining to the university’s revenues. Further, we find you have demonstrated that release of the information we have marked would cause specific harm to the university’s

marketplace interests. We therefore conclude the university may withhold the information we have marked under section 552.104.

You state the remaining information you have marked under section 552.104 pertains to the Big 12's competition for television broadcast revenues on behalf of its member institutions. However, we find you have failed to demonstrate how the university has specific marketplace interests as to this information, or how release of any of the remaining information you have marked would harm the university's interests in a particular competitive situation. Therefore, we find you have failed to demonstrate release of the information at issue would cause specific harm to the university's marketplace interests. Consequently, the university may not withhold any of the remaining information under section 552.104 of the Government Code.

The Big 12 asserts some of the submitted information is excepted from disclosure under the attorney-client privilege found in section 552.107 of the Government Code.² Section 552.107 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). However, section 552.107 protects the interests of governmental bodies, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 630 at 4 (governmental body may waive attorney-client privilege under section 552.107), 522 (1989) (discretionary exceptions in general). As the university does not raise section 552.107 for any portion of the submitted information, we will not consider the Big 12's argument under this exception. *See* ORD 630.

The Big 12 also asserts the information at issue is excepted from disclosure under section 552.110 of the Government Code. 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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

²Although the Big 12 raises Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision No. 676 at 102 (2002).

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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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 *See* 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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 result from release of the information at issue. *Id.* § 552.110(b); 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).

Having considered the Big 12’s arguments and reviewed the information at issue, we find the Big 12 has not shown any of the remaining information meets the definition of a trade

³There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (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).

secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). We also find the Big 12 has made only conclusory allegations that release of the information at issue would cause the Big 12 substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Thus, the university may not withhold any of the remaining information pursuant to section 552.110.

We next address the university's argument under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." *Id.* § 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 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 claim the information you have marked is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. You argue the information you have marked pertains to internal deliberations between university representatives, which you have identified; representatives of other Big 12 member universities; and Big 12 representatives. Upon review, we find the information we have marked within the discussions between only university representatives constitutes advice, opinion, and recommendation relating to policy matters of the university. As such, the university may withhold the information we have marked under section 552.111 of the Government Code on the basis of the deliberative process privilege. However, we find the remaining discussions between only university employees do not consist of advice, opinion, or recommendation, but rather consist of general administrative and purely factual information, or the communications do not pertain to policymaking. Additionally, as to the communications with representatives of other Big 12 member universities and Big 12 representatives, you generally assert the university, the other Big 12 member universities, and the Big 12 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 other member universities or the Big 12, in this instance, are involved in the university's policymaking process or have policymaking authority regarding university matters. We further note the other member universities and the Big 12 have their own interests at stake in the some of the submitted information. Therefore, we find you have failed to demonstrate how the university shares a privity of interest or common deliberative process with these individuals with respect to any of the remaining information. Consequently, we find none of the remaining information is excepted under the deliberative process privilege, and the university may not withhold it under section 552.111 of the Government Code.

You raise section 552.117 of the Government Code for portions of the remaining information. Section 552.117 excepts from disclosure the 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 that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the university must withhold the information you have marked and the additional information we have marked under

section 552.117(a)(1). However, the university must withhold the marked cellular telephone numbers only if the employees pay for the cellular telephone service with personal funds. The university may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

The university and the Big 12 each claim certain e-mail addresses 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). In this instance, some of the e-mail addresses at issue belong to representatives of the Big 12, which has contracted with the university. Because the e-mail addresses were provided to the university by individuals who have a contractual relationship with the university, the e-mail addresses are specifically excluded by section 552.137(c)(1). Consequently, the university may not withhold these e-mail addresses on this basis. Accordingly, with the exception of the e-mail addresses we have marked for release, the university must withhold the e-mail addresses you have marked, as well as the additional e-mail addresses we have marked, under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release under section 552.137(b).⁴

We note some of the remaining information appears to 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.

In summary, the university is not required to release the information we have marked that is not subject to the Act. The university may withhold the information we have marked under section 552.104 of the Government Code and section 552.111 of the Government Code. The university must withhold the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the employees whose information is at issue timely-elected confidentiality under section 552.024 of the Government Code and pay for the cellular

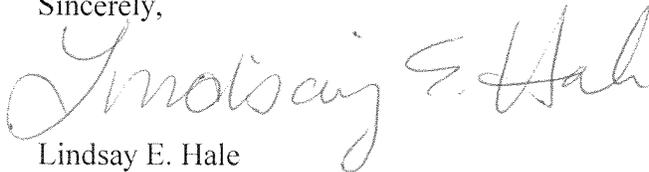
⁴We note this office issued *Open Records Decision No. 684 (2009)*, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

service with personal funds. With the exception of the e-mail addresses we have marked for release, the university must withhold the e-mail addresses you have marked, as well as the additional e-mail addresses we have marked, under section 552.137 of the Government Code unless the owners of the addresses have consented to their release. The university must release the remaining information; however, any information protected by copyright 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 439894

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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