



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2012

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

OR2012-02492

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# 445651 (OGC# 141148).

The University of Texas at Austin (the "university") received a request for (1) all agreements or contracts between "KUT and [National Public Radio ("NPR")] regarding the establishment of StateImpact and any memoranda written by KUT, the [university] or UT system or NPR regarding [the] same[;]" (2) any agreements or contracts between "the Texas Tribune and KUT or the [university] regarding journalistic cooperation, sales or trading/sharing of content[;]" (3) all e-mails between "officials of KUT or the [university] or UT System and NPR, since January 1, 2010, regarding the establishment of StateImpact[;]" and (4) all e-mails between "officials of KUT or the [university] or UT System" and any of three named individuals "or any other official of the Texas Tribune, regarding cooperation, sales or trading/sharing of content since January 1, 2009." You indicate you will release some information to the requestor. You state the university will redact certain information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.¹ You claim that the submitted information

¹Section 552.117 of the Government Code exempts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c)(2).

is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, you state that release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state you have notified the University of Houston, NPR, and the Texas Tribune of the request and of their right to submit arguments as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.104 of the Government Code excepts from required public 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 connection with competitive bidding and in 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 state the university is a competitor in the marketplace in terms of the services that generate revenue and thereby benefit the university and the state economy. You state that KUT, a public radio station operated by the university, is a service of the university's College of Communication. You explain that KUT must engage in ongoing contract negotiations to obtain sponsorships and other sources of revenue to help fund its operations. You state the information you have marked contains details on existing and potential sponsorship terms and agreements. You explain releasing this information would severely disadvantage KUT's bargaining position because it would allow private radio stations and media companies to tailor their pricing specifically to beat pricing offered by KUT, thereby causing KUT to lose existing contracts or be passed over for targeted opportunities. Further, you state releasing this information would cause KUT's revenues to decrease which would also decrease the

²We assume the “representative sample” of records submitted to this office are 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.

fees that flow to the university. Based on your representations and our review, we find you have demonstrated the university has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Further, we find you have demonstrated that release of the information at issue would harm the university’s interests in a particular ongoing competitive situation. We therefore conclude the university may withhold the information you have marked under section 552.104 of the Government Code.

Section 552.111 of the Government Code 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.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, opinions, recommendations, 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

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 Nos. 631 at 2 (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 state the remaining information you have marked consists of communications between university employees and officials, representatives of NPR, the Texas Tribune, and the University of Houston. You state the university shares a privity of interest with these entities on the matters discussed in the remaining documents. However, we note most of the information at issue contains communications relating to contract negotiations between the university and these entities. Because the university and these entities were negotiating contracts, their interests were potentially adverse at the time the communications were made. Thus, the university did not share a privity of interest or common deliberative process with regard to this information. Further, you have not demonstrated the remaining information at issue contains advice, opinion, or recommendations pertaining to policymaking. Accordingly, the university may not withhold the remaining information under section 552.111 of the Government Code.

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) of the Government Code 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, we have not received arguments from any of the third parties. We, thus, have no basis for concluding that any portion of the remaining information constitutes the third parties' proprietary 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. Accordingly, the university may not withhold any of the remaining information based on the proprietary interests of the third parties.

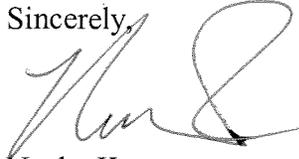
In summary, the university may withhold the information you have marked under section 552.104 of the Government Code. The remaining information must be released.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 445651

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Evan Smith
The Texas Tribune
823 Congress Avenue, Suite 210
Austin, Texas 78701
(w/o enclosures)

Mr. Greg Lewis
National Public Radio
635 Massachusetts Avenue, Northwest
Washington, DC 20001
(w/o enclosures)

Ruth E. Shapiro
Assistant General Counsel
University of Houston System
Ezekiel Cullen Building Suite 311
Houston, Texas 77204-2162
(w/o enclosures)