



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 18, 2016

Ms. Cynthia Tynan
Attorney & Public Information Coordinator
Office of the General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2016-06301

Dear Ms. Tynan:

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# 602085 (OGC# 166858).

The University of Texas at Austin (the "university") received a request for specified categories of information pertaining to specified abortion-related topics. The university informs us it will withhold information pursuant to sections 552.024 and 552.136 of the Government Code and Open Records Decision No. 684 (2009).¹ The university states it is releasing some of the requested information. The university also states some of the submitted information is not subject to the Act, and claims other information is excepted from disclosure under sections 552.101, 552.107, and 552.1235 of the Government Code.

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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 seeking a decision from this office.

In addition, the university informs us, and provides documentation showing, it notified the following third parties of the university's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released: the American Civil Liberties Union (the "ACLU"); the Center for Reproductive Rights (the "center"); Ibis Reproductive Health ("Ibis"); Morrison & Foerster LLP ("Morrison"); the Susan Thompson Buffett Foundation (the "foundation"); the University of Alabama at Birmingham ("UAB"); and the University of California-San Francisco ("UC-SF"). *See* Gov't Code §§ 552.304, .305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence on behalf of the ACLU, the center, Ibis, Morrison, UAB, and UC-SF objecting to the release of some of the information at issue. We have also received comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.²

The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) reads as follows:

(a) In this chapter, "public information" means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

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. In addition, although some of the interested third parties raise section 552.022 of the Government Code, we note this section is not an exception to disclosure under the Act.

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The university asserts the information it has indicated under section 552.002 is personal correspondence, is not public, and is not related to official duties. The university explains its "policies allow for outside activities and employment, including providing expert testimony, separate from and unrelated to an employee's official [u]niversity duties." The university explains the information at issue consists of e-mail communications between university employees and outside organizations not associated with the university. The university explains the communications pertain to the employees, acting in their capacities as members of the public and not as university employees, providing expert testimony on behalf of the organizations. The university states these communications have no connection with the university's business, and are an incidental use of e-mail by university employees. The university further states the use of university resources to create and maintain the information at issue was *de minimis*. 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). Based on these representations and our review of the information at issue, we agree the information at issue does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. See Gov't Code § 552.002. Therefore, the information that the university has indicated under section 552.002 is not subject to the Act, and the university is not required to release it in response to the request.³ Some of the third parties indicate portions of the remaining documents are also not subject to the Act. However, based upon the university's representations and our review, we find the university maintains the remaining information in connection with the transaction of its official business. Thus, the remaining information constitutes "public information" as defined by section 552.002(a). Accordingly, this information is subject to the Act and the

³As our ruling is dispositive, we do not address the other arguments to withhold this information.

university must release it, unless it falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021..301, .302. Therefore, we will address the arguments against the release of the information that is subject to the Act.

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 it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, the foundation has not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any of the remaining information constitutes the foundation's proprietary information, and the university may not withhold any portion of it on that basis. *See* ORD 661 at 5-6 (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 51.914 of the Education Code, which provides the following:

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee;

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties; or

(3) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility that is jointly financed by the federal government and a local government or state agency, including an institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state.

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914. As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has "a potential for being sold, traded, or licensed for a fee." ORD 651 at 9-10. Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* at 10. Thus, this office has stated in considering whether requested information has "a potential for being sold, traded, or licensed for a fee," we will rely on a governmental body's assertion that the information has this potential. *See id.* However, a governmental body's determination that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.* We note section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7.

The university informs us the information it has indicated under section 51.914 pertains to its Texas Policy Evaluation Project, which documents and analyzes the measures affecting reproductive health passed by the 82nd and 83rd Texas Legislatures. The university explains this information contains data obtained by consultants for the university, as well as correspondence that reveals the underlying scientific data and research. Thus, the university argues this information consists of technological and scientific information and relates to a product, device, or process of the university. The university represents this information has the potential for being further sold, traded, or licensed for a fee and is, therefore, confidential pursuant to section 51.914(a)(1). Upon review, we find the university has demonstrated the applicability of section 51.914 of the Education Code to the information at issue. Accordingly, the university must withhold the information it has indicated under section 552.101 of the Government Code in conjunction with section 51.914 of the

Education Code.⁴ However, none of the interested third parties has established any of the remaining information is confidential under section 51.914. Therefore, the university may not withhold any of the remaining information under section 552.101 on that ground.

Section 552.107(1) of the Government Code protects information coming 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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 governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The university asserts the information it has indicated under section 552.107 consists of confidential communications between university attorneys, university employees, and entities that are privileged parties with respect to the communications at issue, and the communications were made for the purpose of rendering professional legal advice. The

⁴As our ruling is dispositive, we do not address the other arguments to withhold this information.

university also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the university has demonstrated the applicability of the attorney-client privilege to this information. Therefore, the university may withhold the information it has indicated under section 552.107(1) of the Government Code.

Ibis and UC-SF raise section 552.104(a) of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* Ibis states it has competitors and argues release of the information it seeks to withhold would cause it substantial competitive harm. Upon review, we find Ibis has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the remaining information Ibis has indicated under section 552.104(a) of the Government Code.⁵ However, we find UC-SF has not provided arguments establishing the applicability of section 552.104(a) to any of the remaining information. Therefore, the university may not withhold any of the remaining information on that ground.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret is

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,

⁵As our ruling is dispositive, we do not address the other arguments to withhold this information.

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 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.⁶ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Upon review, we find UC-SF has not shown any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). We also find UC-SF has failed to establish release of the information at issue would cause it substantial competitive injury. *See id.* § 552.110(b). Therefore, the university may not withhold any of the remaining information pursuant to section 552.110.

Section 552.1235 of the Government Code excepts from disclosure “[t]he 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). For purposes of this exception, “institution of higher education” is defined by section 61.003 of the Education Code. Gov’t Code

⁶The following are the six factors that the Restatement gives 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

§ 552.1235(c). Section 61.003 defines an “institution of higher education” as meaning “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). Because section 552.1235 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 a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). The university states the information it has indicated under section 552.1235 identifies a donor. Based on this representation, we agree the university must withhold the information indicated under section 552.1235 of the Government Code.

To conclude, the information that the university has indicated under section 552.002 is not subject to the Act, and the university is not required to release it in response to the request. The university must withhold the information it has indicated under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code and under section 552.1235 of the Government Code. The university may withhold the information it has indicated under section 552.107(1) of the Government Code. The university may also withhold the remaining information Ibis has indicated under section 552.104(a) of the Government Code. The university must release the remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bhf

Ref: ID# 602085

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. J. Alexander Lawrence
Morrison & Foerster Llp
250 West 55th Street
New York, New York 10019-9601
(w/o enclosures)

Ms. Brigette Amiri
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004-2400
(w/o enclosures)

Center for Reproductive Rights
c/o Ms. Jan Soifer
O'Connell & Soifer LLP
Suite 540
98 San Jacinto Boulevard
Austin, Texas 78701
(w/o enclosures)

Ms. Margaret L. Wu
Managing Counsel
University of California-
San Francisco
1111 Franklin Street, 8th Floor
Oakland, California 94607
(w/o enclosures)

Mr. Terri D. Alexander
University Counsel
The University of Alabama System
1720 2nd Avenue South, Suite AB820
Birmingham, Alabama 35294-0108
(w/o enclosures)

Ibis Reproductive Health
c/o Ms. Susan G. Conway
Graves Dougherty Hearon & Moody PC
P.O. Box 98
Austin, Texas 78767-9998
(w/o enclosures)

Mr. Allen Greenberg
President
Susan Thompson Buffett Foundation
222 Keiwit Plaza
Omaha, Nebraska 68131
(w/o enclosures)