



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 11, 2016

Mr. Matthew W. Burris
Assistant General Counsel
University of North Texas System
1155 Union Circle, #310907
Denton, Texas 76203-5017

OR2016-22675

Dear Mr. Burris:

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# 632447 (UNT PIR Nos. 004282, 004294, 004303, and 004343).

The University of North Texas (the "university") received four requests for a specified contract. Although the university takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of Frisco Management, LP ("FMLP"). Accordingly, the university states, and provides documentation showing, it notified FMLP of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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 comments from FMLP. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

We understand FMLP to claim its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code. 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 information protected by other statutes such as section 31.05 of the Penal Code, which provides in pertinent part:

(b) A person commits an offense if, without the owner’s effective consent, he knowingly:

- (1) steals a trade secret;
- (2) makes a copy of an article representing a trade secret; or
- (3) communicates or transmits a trade secret.

(c) An offense under this section is a felony of the third degree.

Penal Code § 31.05(b), (c). We note section 31.05 does not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the university may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code.

We note the submitted information consists of a contract for the purchase of services from a private vendor that is subject to the posting requirements in section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

- (1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

Gov’t Code § 2261.253(a)(1). The submitted contract is valued at more than \$15,000, is between the university, which is a state agency, and a private vendor for the purchase of services, and the contract is not expired or completed. *See id.* §§ 2261.002(2) (“state agency” has meaning assigned by Gov’t Code § 2151.002), 2151.002(3) (“state agency” includes university system or institution of higher education as defined by Educ. Code

§ 61.003). Accordingly, the submitted contract is required to be posted on the university's internet website. Although FMLP seeks to withhold portions of the submitted information under sections 552.104 and 552.110 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Further, although FMLP seeks to withhold some information under section 552.101 of the Government Code in conjunction with common-law privacy, information that is specifically made public by statute may not be withheld under section 552.101 on the basis of common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when it directly conflicts with common-law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Accordingly, the submitted information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy or under sections 552.104 and 552.110 of the Government Code. However, FMLP also asserts the submitted information is excepted under section 552.101 of the Government Code in conjunction with the doctrine of constitutional privacy. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are “the supreme law of the Land,” and states have a responsibility to enforce federal law. *See* U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 2261.253 of the Government Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Thus, we will address FMLP's argument under section 552.101 of the Government Code in conjunction with constitutional privacy for the submitted contract.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find FMLP has failed to demonstrate any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the submitted information under section 552.101 on the basis of constitutional privacy. Accordingly, the university must release the submitted contract in its entirety.

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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/bw

Ref: ID# 632447

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

Third Party
(w/o enclosures)