



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 3, 2011

Ms. Zeena Angadicheril  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2011-16228

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# 435167 (OGC# 139232).

The University of Texas at Austin (the "university") received a request for communications to and from the university president, chancellor, and athletic director, related to Texas A&M University's potential move to the Southeastern Conference, the Big 12 Conference (the "Big 12"), the Longhorn Network, and individual school television networks. You state the university will redact information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.<sup>1</sup> You further state the university will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Further, although you take no position as to whether some of the submitted information is excepted under the Act, you state release of the submitted

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<sup>1</sup>Section 552.117 of the Government Code 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. 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)). 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* Gov't Code § 552.024(c).

<sup>2</sup>We note Open Records Decision No. 684 is 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.

information may implicate the proprietary interests of the Big 12, IMG Communications, Inc. (“IMG”), and ESPN, Inc. (“ESPN”). Accordingly, you state, and provide documentation showing, you notified the Big 12, IMG, and ESPN of the request for information and of their rights 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) (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 an attorney for the Big 12. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, you state some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-16115 (2011). In that ruling, we determined the university must release the submitted information in its entirety. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the university must rely on Open Records Letter No. 2011-16115 as a previous determination and release the identical information, which we have marked, in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider the submitted arguments for the information not subject to the previous determination.

The Big 12 argues the submitted information relating to the Big 12 is not subject to 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).

The Big 12 contends the information at issue is not subject to the Act because the information was generated by the Big 12, which is not a governmental body. We note, however, the information at issue was sent to the university’s president, men’s athletic director, and women’s athletic director, and is in the possession of the university.

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<sup>3</sup>We 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.

Furthermore, this information was collected, assembled, or maintained in connection with the transaction of the university's official business, and the university has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and must be released, unless the Big 12 or the university demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Next, 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.

We next address the university's argument 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, no pet.). 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 governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state some of the submitted information, which you have marked, consists of communications involving university attorneys, legal staff, and employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the university. You state these communications were confidential, and you state the university has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the university may generally withhold the information you have marked under section 552.107(1) of the Government Code. We note one of the individual e-mails contained in an otherwise privileged e-mail string consists of a communication with individuals whom you have not shown to be privileged parties. Thus, to the extent the non-privileged e-mail, which we have marked, exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1).

The Big 12 claims some of the remaining information is excepted from disclosure under section 552.107 of the Government Code. However, section 552.107(1) is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See Open Records Decision Nos. 676 at 10-11* (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). As the university does not seek to withhold any portion of the remaining information under section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to the remaining information, and the university may not withhold any of the remaining information on that basis. *See ORD 676*.

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.” Gov’t Code

§ 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 employees, the commissioner of the Big 12, representatives of other Big 12 member universities, and other third parties. You generally assert the university, the Big 12, the other Big 12 member universities, and the other third parties 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 Big 12, the other member universities, or the other third parties, in this instance, are involved in the university's

policymaking process or have policymaking authority regarding university matters. We further note the Big 12, the other member universities, and the other third parties have their own interests at stake in 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 the information at issue. Additionally, we find the discussions only between 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. Thus, we find you have not demonstrated how these communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the university. Consequently, the information at issue is not excepted under the deliberative process privilege, and the university may not withhold it under section 552.111 of the Government Code.

Next, we note 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from IMG or ESPN explaining why the remaining information should not be released. Therefore, we have no basis to conclude either IMG or ESPN has a protected proprietary interest in the remaining 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 information at issue on the basis of any proprietary interest IMG or ESPN may have in the information.

The Big 12 claims the information at issue is also excepted under section 552.110(b) of the Government Code, which 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; ORD 661 at 5-6.

The Big 12 argues the information at issue constitutes commercial and financial information that, if released, would cause the company substantial competitive harm. Upon review, however, we find the Big 12 has made only general conclusory assertions that release of the information at issue would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See generally* Open Records Decision Nos. 661, 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). Therefore, the university may not withhold the information at issue under section 552.110(b) of the Government Code.

Next, the Big 12 argues section 552.131 of the Government Code for portions of the information at issue. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

...

(2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)(2), (b). Section 552.131(a) excepts from disclosure “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.” *Id.* § 552.131(a)(2). This aspect of section 552.131 is co-extensive with section 552.110(b) of the Government Code. *See id.* § 552.110(b); ORDs 552 at 5, 661 at 5-6. Because we have already disposed of the Big 12's claims under section 552.110(b), the university may not withhold any of the Big 12's information under section 552.131(a)(2) of the Government Code. Furthermore, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the university does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the information at issue is excepted under section 552.131(b) of the Government Code.

The Big 12 claims certain e-mail addresses in the submitted 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, the e-mail addresses at issue belong to

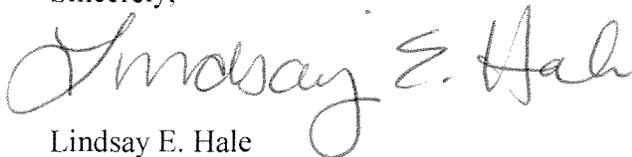
representatives of the Big 12, which has contracted with the university. Because the e-mail addresses were provided to the university by individuals who have a contractual relationship with the university, the e-mail addresses are specifically excluded by section 552.137(c)(1). Consequently, the university may not withhold the e-mail addresses at issue under section 552.137 of the Government Code.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the university must rely on Open Records Letter No. 2011-16115 as a previous determination and release the identical information in accordance with that ruling. The university may withhold the information you have marked under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1). 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](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,



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Assistant Attorney General  
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LEH/agn

Ref: ID# 435167

Enc. Submitted documents

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