



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2012

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

OR2012-01087

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# 443168.

Texas Tech University (the "university") received two requests from different requestors for (1) all e-mails mentioning RaiderPark Parking Garage and RaiderPark, L.P. sent and received by certain named individuals or between these named individuals and two other named individuals; (2) all documents from the Red Raider Club or the Texas Tech Alumni Association that mention the RaiderPark parking garage; and (3) all e-mails or memos sent and received by a specified individual regarding the RaiderPark Parking Facility, including the revenue generated from the lease. You state the university will provide some of the requested information to the requestors. You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.1235, 552.137, and 552.147 of the Government Code.¹ You also state release of some of the remaining requested information may implicate the proprietary interests of RaiderPark, L.P. ("RP") and the Texas Tech Alumni Association ("TTAA"). Accordingly, you state, and

¹Although you cite to sections 6103(a) of title 26 of the United States Code; 261.201 of the Family Code; 551.104 of the Government Code; 611.002 of the Health and Safety Code; and 159.002 and 1701.306 of the Occupations Code as examples of statutes encompassed by section 552.101 of the Government Code, you have not provided any arguments explaining how these statutes apply to the information at issue. Therefore, we do not address these statutes. *See* Gov't Code §§ 552.301, .302.

provide documentation showing, the university notified RP and TTAA of the request and of each company's right 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) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from RP. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you state a majority of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-17842 (2011). In that ruling, we concluded the university may withhold the information you marked under section 552.107(1) of the Government Code, the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, the information we marked under section 552.111 of the Government Code. In addition, we ruled, if the employees whose cellular telephone numbers were at issue timely requested confidentiality for their personal information and the marked cellular telephone numbers were the employees' personal cellular telephone numbers, the university must withhold the marked cellular telephone numbers pursuant to section 552.117(a)(1) of the Government Code. Further, we ruled the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the address owners have consented to the release of the addresses. Finally, we ruled the university must withhold RP's customer information we had marked under section 552.110(a) of the Government Code and the university must release the remaining information, but any information protected by copyright must be released in accordance with copyright law. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, because you assert the submitted information, except for the portions you have identified, is identical to the information previously requested and ruled upon by this office in the prior ruling, the university must continue to rely on that ruling as a previous determination and withhold or release the identical information in accordance with Open Records Letter No. 2011-17842.³ *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). You assert the information you have marked with yellow flags are the portions of the submitted

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.

³As our ruling is dispositive, we need not address the university's or the third party's remaining arguments against disclosure for this information.

information that are not encompassed by Open Records Letter No. 2011-17842, therefore we will address your arguments against the release of this information.

You assert some of the remaining requested information is excepted from disclosure 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, and lawyer representatives. *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, orig. proceeding). 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 seek to withhold the information you have marked under section 552.107(1). You state the information consists of communications between university attorneys, university officials, and individuals who have a common-interest with the university, made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we agree you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Therefore,

the university may withhold the information you have marked under section 552.107(1) of the Government Code.

You claim portions of the remaining information are excepted from disclosure under section 552.111 of the Government Code, which 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. 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.

This office also has concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

We note section 552.111 can encompass a governmental body’s communications with a third-party, including a consultant or other party with which the governmental body shares

a common deliberative process or privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 of the Government Code encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order 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. We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state portions of the remaining information you marked relates to communications involving university officials and entities with which the university shares a privity of interest. You explain the university and those entities are working together pursuant to an executed lease agreement to provide additional parking to students, faculty, and visitors. You further explain the communications pertain to parking policymaking matters affecting the university and the entities in privity with the university. Based on your representations and our review of the information at issue, we conclude the university may withhold the information we have marked under section 552.111 of the Government Code. We note, some of the remaining information pertains to contract negotiations between the university, RP, and TTAA. Because the university was negotiating a contract with RP and TTAA, their interests were adverse. Thus, we conclude the university, RP, and TTAA did not share a privity of interest or common deliberative process with respect to the information pertaining to contract negotiations. Consequently, the university may not withhold any of the remaining information at issue under section 552.111 of the Government 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. Section 552.101 encompasses the constitutional right to privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions relating to the “zones of privacy” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs” and the scope of information protected is narrower than that under the common-law doctrine of privacy. *Id.* at 5 (internal

quotations omitted) (quoting *Ramie*, 765 F.2d at 492). You seek to withhold information pertaining to a suicide. However, the right to privacy is a personal right that lapses at death and, therefore, does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, we find no portion of the information at issue falls within the constitutional zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See Open Records Decision No. 670 at 6 (2001)* (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether 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)*. The university may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

You seek to withhold university employees’ cellular telephone numbers in the remaining information. You have not informed us, however, whether or not the employees timely chose to restrict public access to their personal information. Furthermore, you have not informed us whether or not some of these individuals paid for their cellular telephone service. Therefore, if the employees timely requested confidentiality for their personal information and the cellular telephone numbers are the employees’ personal cellular telephone numbers, the university must withhold the cellular telephone numbers you have marked, and the additional numbers we have marked, in the remaining information pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely request confidentiality or the marked cellular telephone numbers are not personal cellular telephone numbers, the university may not withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code.

You claim the e-mail addresses you have marked 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, most of the e-mail addresses you seek to withhold belong to representatives of RP or TTAA, which have contracted with the university. Because of the contractual relationship between the university and these entities, the e-mail addresses of RP or TTAA representatives are specifically excluded by section 552.137(c)(1). Consequently, the university may not withhold these e-mail addresses under section 552.137 of the Government Code. However, we are unable to determine whether one of the e-mail addresses you seek to withhold, which we have marked, is excluded by subsection (c). Therefore, we must rule conditionally. To the extent the marked e-mail address belongs to a member of the public who has not affirmatively consented to its release and it is not subject to subsection (c), the university must withhold the personal e-mail address we have marked under section 552.137 of the Government Code. However, to the extent the marked e-mail address is subject to subsection (c), it may not be withheld under section 552.137 of the Government Code.

RP claims some of the remaining information is excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *Id.* § 552.110(a)-(b).

Section 552.110(a) protects 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, which holds a “trade secret” to be

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, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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.⁴ Open Records Decision No. 402 (1983).

Section 552.110(b) protects "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." Gov't Code § 552.110(b). This section 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.*; Open Records Decision No. 661 at 5-6 (1999).

RP claims a portion of the remaining information constitutes trade secrets under section 552.110(a). Upon review, we find RP has not demonstrated how any of the remaining information at issue meets the definition of a trade secret, nor has RP demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b, ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, the university may not withhold any of RP's remaining information under section 552.110(a) of the Government Code.

RP also claims a portion of the remaining information constitutes commercial information that, if released, would cause the company substantial competitive harm. Upon further review, we find RP has not demonstrated how any of the remaining information constitutes commercial or financial information, the disclosure of which would cause it substantial competitive harm. *See* Open Records Decision Nos. 514 (1988) (public has interest in

⁴The Restatement of Torts lists the following six factors 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

knowing prices charged by government contractors), 319 at 3 (1982) (information relating to organization and personnel not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, the university may not withhold any of RP's information under section 552.110(b) 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from TTAA explaining why any of the remaining information at issue should not be released. Therefore, we have no basis to conclude TTAA has protected proprietary interests in the information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (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. Consequently, the university may not withhold any of the remaining information at issue on the basis of any proprietary interest TTAA may have in the information.

In summary, the university must rely on Open Records Letter No. 2011-17842 (2011) as a previous determination and withhold or release the identical portions of the submitted information in accordance with that ruling. The university may withhold the information it has marked under section 552.107(1) of the Government Code. The university may withhold the information we have marked under section 552.111 of the Government Code. If the employees whose cellular telephone numbers are at issue timely requested confidentiality for their personal information and the marked cellular telephone numbers are the employees' personal cellular telephone numbers, the university must withhold the marked cellular telephone numbers pursuant to section 552.117(a)(1) of the Government Code. To the extent the e-mail address we have marked belongs to a member of the public who has not affirmatively consented to its release and are not subject to subsection (c), the university must withhold the personal e-mail address under section 552.137 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.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,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/em

Ref: ID# 443168

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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