



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2014

Ms. Cynthia Tynan
Attorney and Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2014-22200

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# 543937 (OGC# 158182).

The University of Texas at Austin (the "university") received a request for all correspondence between two named university employees; representatives of Jenner & Block, LLP ("Jenner"); and representatives of Patterson, Belknap, Webb & Tyler, PC. You state you do not have information pertaining to part of the request.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Jenner. Accordingly, you state, and provide documentation showing, you notified Jenner 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 Jenner. We have also received comments from the requestor. *See Gov't Code* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, Jenner asserts the submitted information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as

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
- (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). 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). Jenner informs us it hired one of the named university employees to serve as a consultant and expert for its client in a patent infringement case between two private parties. Jenner states the submitted information consists of communications between the employee at issue and representatives of Jenner relating to the expert report and testimony he rendered for this case. Jenner argues the submitted information concerns work performed by the employee at issue as a private consultant in connection with private litigation between two non-governmental entities, and, as such, does not consist of information written, produced, collected, assembled, or maintained by or for the university under a law or ordinance or in connection with the transaction of the official business of the university. We note, however, the university submitted the information at issue as subject to the Act and raises no objection against its treatment as such. Further, pursuant to section 552.303 of the Government Code, this office asked the university to provide additional information regarding how the university maintains, gathered, and used the submitted information. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of

notice). In the university's response, it informed this office the submitted information was gathered for use by university officials in an investigation into allegations of wrongdoing against the employee at issue with regard to his consulting relationship with Jenner. Based on these representations and our review, we find the submitted information constitutes information that was collected, assembled, or maintained by the university in connection with the transaction of its official business. Accordingly, the submitted information is subject to the Act and must be released unless the information falls within an exception to public disclosure under the Act. *See id.* § 552.305(b).

We note the submitted information is subject to section 552.022 of the Government Code. Subsection 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" *Id.* § 552.022(a)(1). The submitted information consists of communications that are part of a completed investigation. This information is subject to subsection 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. Jenner raises section 552.107(2) of the Government Code for the submitted information and asserts a court order prohibits disclosure of the submitted information. Section 552.107(2) allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." *Id.* § 552.107(2). However, subsection 552.022(b) provides a court may not order a governmental body to withhold from public inspection any category of information described by subsection (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because subsection 552.022(b) prohibits a court from ordering documents subject to subsection 552.022(a) to be withheld, we conclude the university may not withhold the submitted information under section 552.107(2) of the Government Code. Additionally, Jenner raises Federal Rule of Civil Procedure 26(b) for the submitted information. We note the courts have not found the Federal Rules of Civil Procedure to be "other law" for the purposes of section 552.022. Therefore, the university may not withhold the submitted information under rule 26(b) of the Federal Rules of Civil Procedure. However, because section 552.101 can make information confidential under the Act, we will consider Jenner's argument under this section for the submitted information. Further, we note portions of the submitted information are subject to section 552.137 of the Government Code, which makes information confidential under the Act.² Therefore, we will also address the applicability of section 552.137 to the submitted information.

Jenner asserts section 552.101 of the Government Code for the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law,

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information that is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, Jenner has failed to direct our attention to any law, nor are we aware of any law, under which any of the submitted information is considered to be confidential for purposes of section 552.101. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code.

Section 552.137 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). Upon review, we find the university must withhold the e-mail addresses we have indicated under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

In summary, the university must withhold the e-mail addresses we have indicated under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. 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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 543937

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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