



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 19, 2020

Mr. Ronny H. Wall
Senior Associate General Counsel
Texas Tech University System
P.O. Box 45031
Lubbock, Texas 79409-5031

OR2020-29000

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# 853550 (Ref. No. OR-416).

Texas Tech University (the "university") received a request for all correspondence between two university employees containing a specified keyword or referring to a certain individual during a stated time period. The university states it will release some of the requested information. The university claims portions of the submitted information are excepted from disclosure under sections 552.107 and 552.136 of the Government Code. Additionally, the university states release of the submitted information may implicate the proprietary interests of The Big 12 Conference, Inc. (the "Big 12"). Accordingly, the university states, and provides documentation showing, it notified the Big 12 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 the Big 12. We have reviewed the submitted information and considered the submitted arguments.

The Big 12 argues some of the submitted information is not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) of the Government Code defines "public information" as the following:

[I]nformation that 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). 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 of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (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 consists of e-mails and attachments between the university, the Big 12, and other third parties that were sent to the university and are in the possession of the university. 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. Thus, the information at issue is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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). 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: (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 states Exhibit B consists of communications involving attorneys for the university, privileged third parties, and university employees and officials in their capacities as clients. The university states these communications were made in furtherance of the rendition of professional legal services to the university. The university states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the university has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the university may withhold Exhibit B under section 552.107(1) of the Government Code.¹

Section 552.110(c) of the Government Code 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[.]” Gov’t Code § 552.110(c). The Big 12 argues the remaining information consists of commercial or financial information subject to section 552.110(c). Upon review, we find the Big 12 has demonstrated some of the information at issue

¹ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the university must withhold the information we have marked under section 552.110(c) of the Government Code.² However, we find the Big 12 has failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the university may not withhold any of the remaining information under section 552.110(c) of the Government Code.

Section 552.1101 of the Government Code provides, in relevant part:

(a) . . . [I]nformation submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Id. § 552.1101(a). The Big 12 asserts disclosure of the remaining information would reveal an individual approach to internal operations and processes and give advantage to a competitor. However, we find the Big 12 has failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the university may not withhold it on that basis.

Section 552.136 provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the university must withhold the information it has marked under section 552.136 of the Government Code.³

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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a university employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of section 552.137(a)). Because we are unable to discern whether the e-mail addresses at issue belong to university employees or officials or fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See Gov’t Code* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c) or belong to a university employee or official, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, the university may withhold Exhibit B under section 552.107(1) of the Government Code. The university must withhold the information we have marked under section 552.110(c) of the Government Code. The university must withhold the information it has marked under section 552.136 of the Government Code. To the extent the e-mail addresses at issue belong to members of the public, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

³ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/mo

Ref: ID# 853550

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)