



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 9, 2022

Ms. Jennifer Burnett
Assistant General Counsel & Public Information Coordinator
University of Texas System
210 West Seventh Street
Austin, Texas 78701

OR2022-13163

Dear Ms. Burnett:

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# 946736 (OGC# 204399, 204558).

The University of Texas Southwestern Medical Center (the "university") received two requests from different requestors for information related to a specified request for proposals.¹ You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. In addition, you state release of the submitted information may implicate the proprietary interests of Ardent Creative; Blenderbox; Content Bloom; Cyfuture, Inc.; ImageX Media; ISF, Inc.; Promet Source; Robert Half International, Inc.; TechRover Solutions, Inc.; Terminalfour, Inc. ("Terminalfour"); Trademark Media d/b/a Mighty Citizen; and Yext. Accordingly, you state, and provide documentation showing, you notified these third parties of the requests for information and of the 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

¹ You state the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

circumstances). We have received comments from Terminalfour.² We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample of information.³

Initially, 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 any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” *Id.* § 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, writ ref'd n.r.e.); 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 that consist 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).

² Although Terminalfour raises section 552.305 of the Government Code, we note section 552.305 is not an exception to disclosure under the Act. Rather, section 552.305 provides the procedural requirements for notifying third parties that their interests may be affected by a request for information. *See* Gov't Code § 552.305.

³ 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.

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You seek to withhold some of the submitted information under section 552.111 of the Government Code. You state the information at issue was used by university employees in deliberations related to ranking and evaluating vendor proposals submitted to the university, and thus relates to policymaking matters of the university. Based on these representations and our review of the information at issue, we find the university has demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the university. Therefore, the university may withhold the information you marked under section 552.111 of the Government Code.

Terminalfour raises section 552.104 of the Government Code for some of its information at issue. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. See *Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code § 552.104(a). Therefore, we do not address Terminalfour’s arguments under section 552.104 of the Government Code.

Section 552.110(b) of the Government Code states “information is excepted from [required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” See *id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). 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[.]” *Id.* § 552.110(c).

Terminalfour argues some of its information at issue is subject to section 552.110 of the Government Code. Upon review, we find Terminalfour has demonstrated portions of its information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the university must withhold Terminalfour’s customer information under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by Terminalfour, including but not limited to on its company website or social media accounts, it may not be withheld under section 552.110.⁴ Nevertheless, we find Terminalfour has failed to provide specific factual evidence demonstrating any portion of its remaining information at issue is a trade secret or 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 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 [required disclosure] 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.

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Id. § 552.1101(a). Terminalfour argues some of its remaining information at issue is subject to section 552.1101(a) of the Government Code. However, we find Terminalfour 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.

Terminalfour also asserts some of its remaining information at issue is subject to section 552.131 of the Government Code. 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:

(1) a trade secret of the business prospect; or

(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].

Id. § 552.131(a)-(b). We note the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(b)-(c). Because we have already disposed of Terminalfour's claims under section 552.110, the university may not withhold any of the remaining information at issue under section 552.131(a) of the Government Code. We also 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.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Initially, we note common-law privacy protects the interests of individuals, not those of corporate and other

business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). We also note there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Finally, we note an individual's name, address, and phone number are generally not private information under common-law privacy. *See* Open Records Decision No. 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy).

Terminalfour asserts some of its remaining information is protected by common-law privacy. Upon review, however, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the university may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

We note some of the remaining materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the university may withhold the information you marked under section 552.111 of the Government Code. The university must withhold Terminalfour's customer information under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by Terminalfour, including but not limited to on its company website or social media accounts, it may not be withheld under section 552.110 of the Government Code. The university must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

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

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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/mo

Ref: ID# 946736

Enc. Submitted documents

c: Requestor
(w/o enclosures)

12 Third Parties
(w/o enclosures)