



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 29, 2022

Ms. Audra Gonzalez Welter
Office of the General Counsel
The University of Texas System
210 West 7th Street
Austin, Texas 78701

OR2022-22325

Dear Ms. Welter:

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# 962535 (OGC# 206206).

The University of Texas Medical Branch at Galveston (the "university") received a request for all proposals submitted in response to a specified request for proposals, related bid tabulations, and contract performance reports for the winning bid. You state the university will redact information insurance policy numbers pursuant to section 552.136(c) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code and protected by copyright law. Additionally, you state release of the submitted information may implicate the proprietary interests of BC Services; CBE Companies; Change Healthcare; CMI Group; Ensource; Financial Corporation of America; GetixHealth; Harris & Harris; ITx Companies; JP Recovery Services; Med Cycle; Med-Data, Inc. d/b/a Elevate PFS ("Elevate"); PFC USA; PFS Group ("PFS"); Revco Solutions; RTR Financial; State Collection Services; and Total Credit Recovery. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should

¹ Section 552.136(c) of the Government Code allows a government body to redact the information described in section 552.136(b) without the necessity of seeking a decision from this office. See Gov't Code § 552.136(c). If a governmental body redacts such information it must notify the requestor in accordance with section 552.136(e). See *id.* § 552.136(d), (e).

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 Elevate and PFS. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why info relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining notified third parties. Thus, we have no basis to conclude any of the remaining 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 any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.101 of the Government Code excepts from disclosure "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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, we find you have failed to demonstrate any of submitted information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

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[.]" 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, 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).

Further, section 552.111 does not protect facts and written observations of facts and events 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 state some of the submitted information consists of bid tabulation and scoring information for the specified request for proposals. You explain this information is reflective of the deliberative and policymaking processes by which the university ranks the bid proposals at issue. Thus, you state the information at issue consists of advice, opinions, and recommendations of the university pertaining to its policymaking functions. 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. Thus, the university may withhold the information it indicated under section 552.111 of the Government Code.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, information is excepted from [required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” Gov't Code § 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 states:

Except as provided by [s]ection 552.0222, 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 is excepted from [required disclosure].

Id. § 552.110(c). Elevate and PFS argue some of their information consists of trade secrets subject to section 552.110(b) and commercial or financial information, the release of which would cause substantial competitive harm.² However, we find some of the information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110. Upon review, we find Elevate has demonstrated some of its information, which we marked, constitutes a trade secret. Accordingly, the university must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent the marked customer information of Elevate is made available to the public by Elevate, including on its website or social media accounts, it may not be withheld under section 552.110(b).³ In addition, we find Elevate and PFS have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes a trade secret or commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the university may not withhold any portion of the remaining information at issue under section 552.110(b) or 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;

² Although PFS does not cite to section 552.110 of the Government Code in its brief, we understand it to raise this exception based on its arguments.

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

(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). Elevate asserts disclosure of some of its remaining information would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing methodology and give advantage to a competitor. Upon review, we find Elevate 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.

The university notes some of the 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 it indicated under section 552.111 of the Government Code. The university must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent the marked customer information of Elevate is made available to the public by Elevate, including on its website or social media accounts, it may not be withheld under section 552.110(b). The university must release the remaining information; however, any information protected by copyright may only be released 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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/be

Ref: ID# 962535

Enc. Submitted documents

c: Requestor
(w/o enclosures)

18 Third Parties
(w/o enclosures)