ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2011

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2011-16242

Dear Ms. Angadicheril:

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# 435333 (OGC# 139287).

The University of Texas at Austin (the "university") received a request for (a) specified contracts pertaining to television ,the sale and licensing of film footage and photographs, and video game manufacturers pertaining to the university's men's basketball and football teams over a specified period of time; (b) release forms signed by the members of the university's men's basketball and football teams during the 2008-2009 academic year that relate to the use of a current or former student's name, image, or likeness; and (c) exemplars of all licensing and royalty reports over a specified period of time. You state the university will provide some of the requested information to the requestor. You assert some of theremaining requested information is excepted from disclosure under sections 552.104, 552.107, and 552.111. You state release of the submitted information may implicate the proprietary interests of the American Broadcasting Company ("ABC"); the Bowl Championship Series ("BCS"); the Big 12 Conference, Inc. (the "Big 12"); Collegiate Images, L.L.C. ("Collegiate Images"); The Collegiate Licensing Company ("CLC"); ESPN, Inc. ("ESPN"); Fox Sports Southwest ("Fox"); IMG College, L.L.C. ("IMG") f/k/a Host Communications, Inc.; and Pictopia, Inc. ("Pictopia"). Accordingly, you state, and provide documentation showing, the university notified these third parties of the request and of their 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) (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 the Big 12, CLC, IMG, and Pictopia. We

have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.[1]

Initially, you inform this office the requestor clarified his request and, consequently, portions of the submitted information, which you have indicated, are not responsive to the clarified request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). The university need not release the nonresponsive information in response to this request, and this ruling will not address that information.

Next, the Big 12 argues its submitted information is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," *see* Gov't Code § 552.021, which is defined by section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). The Big 12 contends its submitted information 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 contracts between the university, the Big 12, and other 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. Therefore, we conclude the information at issue is subject to the Act and must be released, unless the Big 12 demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021.

You state some of the responsive information is the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-10656 (2011) and 2011-05101 (2011). In these decisions, we ruled the university may withhold certain information in its contract with ESPN and IMG under section 552.104 of the Government Code. You state the law, facts, and circumstances on which the prior rulings were based have not changed. Accordingly, upon review, we find the university may continue to rely on Open Records Letter Nos. 2011-10656 and 2011-05101 as previous determinations and continue to withhold the information you have marked in accordance with those prior rulings.[2] *See* Open Records Decision No. 673 (2001) (so long as law, facts,

---

[1]We assume that 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 that those records contain substantially different types of information than that submitted to this office.

[2]As our ruling is dispositive for this information, we need not address your argument under section 552.104 of the Government Code.

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).

We next 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from ABC, BCS, Collegiate Images, ESPN, or Fox explaining why their information should not be released. Further, although CLC and IMG generally assert their information should be excepted from disclosure, CLC and IMG have not raised any exceptions to disclosure under the Act or provided any arguments against disclosure of their information. Therefore, we have no basis to conclude ABC, BCS, CLC, Collegiate Images, ESPN, Fox, or IMG have protected proprietary interests in the responsive information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (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. Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interests ABC, BCS, CLC, Collegiate Images, ESPN, Fox, or IMG may have in it.

Section 552.107(1) of the Government Code protects information coming 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. 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 "for the purpose of facilitating 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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).

You assert the information you have marked contains the handwritten comments of a university attorney that constitute communications to a university official that were made for the purpose of providing legal advice to the university. You also assert these communications were made in confidence and the university has maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the university may withhold the information you have marked under section 552.107.[3] However, as you acknowledge, to the extent versions of these documents without the handwritten comments exist, the university may not withhold them under section 552.107 of the Government Code.

The Big 12 argues some of its information is confidential because the information is made confidential by contracts between the Big 12 and various third party television networks; release of the information would cause the Big 12 to be in breach of those contracts; and the Big 12 provided the information to the university with the expectation the information would remain confidential. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the information the Big 12 seeks to withhold comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The Big 12 and Pictopia claim their information is excepted under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

---

[3]As our ruling on this information is dispositive, we need not address the university's remaining argument for this information under section 552.111 of the Government Code.

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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that a trade secret is

> 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.[4] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

---

[4]The 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 other 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).

Section 552.110(b) protects "[c]ommercial 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 exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 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).

Pictopia claims portions of its information are excepted from disclosure under section 552.110(a). Having considered Pictopia's arguments, we determine Pictopia has failed to demonstrate that any portion of its submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, the university may not withhold any of Pictopia's submitted information on the basis of section 552.110(a) of the Government Code.

Pictopia claims portions of its submitted information are subject to section 552.110(b). The Big 12 argues all of its submitted information is subject to section 552.110(b). Upon review of these third parties' arguments, we find the Big 12 and Pictopia have made only conclusory allegations that the release of any of their submitted information would result in substantial damage to either parties competitive position. Thus, the Big 12 and Pictopia have not demonstrated that substantial competitive injury would result from the release of any of their submitted information at issue. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Further, we note Pictopia's information consists of a contract for services with the university. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a government contract is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, the

university may not withhold any portion of the Big 12's submitted information or Pictopia's submitted information under section 552.110(b).

In summary, the university may continue to rely on Open Records Letter Nos. 2011-10656 and 2011-05101 as previous determinations and continue to withhold the information it has marked in accordance with those prior rulings. The university may withhold the information it has marked under section 552.107 of the Government Code. The remaining information must be released.

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,

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/dls

Ref: ID# 435333

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jack Heilig
Vice President
Collegiate Images, L.L.C.
6300 NE 1st Avenue, Suite 203
Fort Lauderdale, Florida 33334
(w/o enclosures)

Mr. Jon W. Heidtke
Senior Vice President and General Manager
Fox Sports Southwest
100 East Royal Lane, Suite 200
Irving, Texas 75039
(w/o enclosures)

Mr. Mark Liebman
President
Pictopia, Inc.
1300 66th Street
Emeryville, California 94608
(w/o enclosures)

Mr. Burke Magnus
Senior Vice President, Programming
ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010
(w/o enclosures)

The Big 12 Conference
c/o Mr. Mit S. Winter
Polsinelli Shughart, P.C.
120 West 12th Street, Suite 12
Kansas City, Missouri 64105
(w/o enclosures)

Mr. Bruce B. Siegal
Senior Vice President and Counsel
Collegiate Licensing Company
290 Interstate North Circle, Suite 200
Atlanta, Georgia 30339
(w/o enclosures)

Mr. Bruce B. Siegal
Senior Vice President and Counsel
IMG College, L.L.C.
290 Interstate North Circle, Suite 200
Atlanta, Georgia 30339
(w/o enclosures)

ABC Sports
Attn: Legal Department
47 West 66th Street, 12th Floor
New York City, New York 10023
(w/o enclosures)

Mr. Bill Hancock
Bowl Championship Series (BCS)
8417 Delmar Lane
Prairie Village, Kansas 66207
(w/o enclosures)

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2011, I caused a true and correct copy of the Motion to Compel Production of Documents by Non-Party, Turner Broadcasting System, Plaintiffs' Supporting Memorandum of Law and the Declaration of Daniel Herrera to be served on Counsel for non-party Turner Broadcasting System, by First Class U.S. Mail and electronic mail at the following address:

James A. Lamberth
TROUTMAN SANDERS LLP
Suite 5200, Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
James.lamberth@troutmansanders.com
Counsel to Turner Broadcasting System.

/s/ Kimberly J. Johnson
An Attorney for Plaintiffs