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January 11, 2023

*Via Texas Attorney General
PIA eFiling System*

Attorney General
State of Texas
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Open Records Opinion: Robert Montoya (TPIA_2022_115)

Dear Attorney General Paxton:

On **November 29, 2022**, Texas Woman's University System ("TWU") received a Request for Public Information from **Robert Montoya** ("Requestor"). The request was submitted after business hours on November 29, 2022 so the request is considered received on **November 30, 2022**. The request was assigned TWU number TPIA_2022_115. A copy of the request is attached as **Exhibit A**. On **December 13, 2022**, TWU sent a Request for Clarification to the Requestor. Clarification was then provided by the Requestor on the same day, December 13, 2022. Copies of these communications are also attached in **Exhibit A**. TWU notes that the following days were holidays: December 23, 2022, December 26, 2022, December 27, 2022, December 28, 2022, December 29, 2022, and December 30, 2022.

TWU asserts that portions of the information responsive to this request is excepted from required disclosure. Pursuant to Section 552.301(a) of the Texas Government Code, this brief is submitted to seek a decision as to whether Texas Government Code Section(s) **552.104: Information Related to Competition or Bidding** and **Section 552.111: Agency Memoranda** apply to the responsive information.

TWU has copied the Requestor as a recipient of this brief pursuant to Section 552.301(e-1) of the Texas Government Code. We have attached the responsive information, all of which TWU seeks to except from disclosure via withholding, as **Exhibit B**. Exhibits have not been provided in the copy of this letter to the Requestor.

Request for Information

The request for information is for records related to the Bill and Melinda Gates Foundation ("Foundation"). The Requestor is seeking all records related to applications for grants, programs, projects, guidelines, directives, policies, or research associated with the Foundation. Information responsive to this request is found in **Exhibit B**. TWU asserts that the responsive information should be excepted from required disclosure via withholding.

[Continued]

Information Related to Competition or Bidding

Section 552.104(a) of the Texas Government Code states that information is excepted from disclosure “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.”

While in *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex.2015), the Texas Supreme Court held that Section 552.104 does not preclude third parties from raising Section 552.104 as an exception to disclosure,¹ TWU acknowledges that the Eighty-sixth Legislature has amended Section 552.104 since the issuance of *Boeing*² and Section 552.104 now expressly limits the protections of Section 552.104 to governmental bodies. TWU therefore seeks to withhold the responsive information under the protection of Section 552.104.

The Requestor seeks to obtain information from TWU regarding records related to the Foundation. The responsive documents contain information prepared by internal TWU departments in order to request funding from the Foundation (“TWU Request”). The responsive documents detail four (4) primary projects (“Projects”) that TWU may pursue in the future, which would include requesting funding for such Projects. These documents also include estimated costs for the TWU Request in order to complete the Projects.

If TWU is required to release any of this information, it will impact TWU’s ability to seek funding from external sources for the Projects in the future. Specifically, if the responsive information is released, other institutions of higher education may be in a position to adopt similar projects and submit their own bolstered requests for funding. This potential for duplication of the Projects would harm TWU in a future competitive situation as it would result in an entity reviewing multiple similar requests for funding that would directly and detrimentally impact TWU. Again, TWU considers these Projects to be ongoing goals and will continue to explore options for future funding for the Projects. Institutions of higher education may also use this information to gain a more competitive position by lowering their estimated costs for the Projects. An institution of higher education may have intended to request a higher amount from the potential awarding entity but, upon seeing released information, may decrease the amount of their request in order to increase their chances of being selected for funding. If an institution of higher education applies for funding based on the release of this information, it will undermine TWU’s ability to pursue future funding for the Projects.

The release of this information will harm TWU’s interests in future competitive situations related to grants. TWU therefore seeks to withhold all of the information on the attached **Exhibit B** under Section 552.104.

[Continued]

¹ *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex.2015) at 842

² Act of May 25, 2019, 86th Leg., R.S., S.B.943, Section 3

Agency Memoranda

Section 552.111 of the Texas 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.” The responsive information has been generated by agency personnel for submission to an external third party, the Foundation.

Additionally, an agency’s communications with other agencies and third parties, the Foundation in this instance, are protected if the agency demonstrates that the parties to the communications share a privity of interest.³ In submitting the TWU Request to the Foundation, both entities have a mutual interest and connection and are interested in working toward the same goal, the proposed Projects associated with the TWU Request.

TWU therefore seeks to withhold information under deliberative process privilege that is incorporated in Section 552.111. This privilege protects from disclosure intraagency and interagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body at issue.⁴ The responsive documents contain recommendations on how TWU would use the Foundation funds to complete the Projects detailed in the TWU Request. The information was provided to the Foundation to allow them to appropriately consider the recommendations for the Projects and determine if funding would be granted.

Further, the responsive information detail internal concepts and recommendations and are not purely factual information. The TWU Request includes information presented in a frank and open manner to appropriately inform the Foundation as to how the Projects would be completed given the current state of TWU resources and are in connection with the decision-making process regarding the TWU Request. These Projects are broad in scope and affect TWU’s mission and vision. As TWU is a smaller institute of higher education in Texas, any future implementation of these Projects will impact various departments, employees, and TWU Students.

As such, the responsive documents are recommendations that impact TWU’s vision for the future of its students and which TWU seeks to except from disclosure. TWU therefore seeks to withhold all of the information on the attached **Exhibit B** under Section 552.111.

Summary

TWU respectfully requests a decision from the Open Records Division regarding the applicability of the argued exceptions as provided by the Texas Public Information Act.

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³ Open Records Decision No. 561 at 9 (1990) (correspondence from Federal Bureau of Investigation officer to city was not protected by statutory predecessor to Gov’t Code § § 552.111, where no privity of interest or common deliberative process existed between federal agency and city)

⁴ City of Garland v. Dallas Morning News, 22 S.W.3d 351, 361, 364 (Tex. 2000); Arlington Indep. Sch. Dist. v. Tex. Attorney Gen., 37 S.W.3d 152, 158 (Tex. App.—Austin 2001, no pet.); Open Records Decision No. 615 at 5 (1993).

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Please call me at (940) 898-3250 should you have questions or require any additional information.

Sincerely,



Katherine Antwi Green
General Counsel, Secretary to the Board of Regents,
and Chief Compliance Officer
Office of General Counsel
Texas Woman's University System

Cc:

Robert Montoya
(Without enclosures)
Via email: rmontoya@texasscorecard.com