ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2008

Ms. Valerie Coleman-Ferguson
Associate General Counsel
University of Houston System
311 East Cullen Building
Houston, Texas 77204-2028

OR2008-13399

Dear Ms. Coleman-Ferguson:

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# 323429.

The University of Houston (the "university") received a request for: (1) all correspondence concerning the Fair Labor Association (the "FLA"); (2) all financial records involving payments to the FLA from the university; (3) and all financial records concerning FLA donations or payments to the university. You state that you will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

Initially, we note that some of the responsive information may be the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-06892 (2008). In that ruling, we concluded that the university may withhold some of the submitted information under section 552.111 of the Government Code. To the extent

[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.

the pertinent facts and circumstances have not changed since the issuance of this ruling, we conclude that the university may continue to rely on Open Records Letter No. 2008-06892 for the information that was at issue in that ruling. *See* Open Records Decision No. 673 (2001)(so long as law, facts, 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information was not previously requested and ruled upon by this office, we will address your arguments.

Next, we note that you have not submitted information responsive to categories two and three of the request. To the extent any information responsive to these portions of the request existed on the date the university received the request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

You claim that the information contained in Exhibits 7 through 11 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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). 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.* 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 writ). 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).

In this case, you assert that the information at issue consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between clients, client representatives, lawyers, and lawyer representatives identified by the university, and that the communications were to be kept confidential among the intended parties. Finally, you state that the university has not waived its privilege with respect to any of the communications at issue. Therefore, the university may withhold Exhibits 7 though 11 under section 552.107.[2]

You seek to withhold the remaining information, Exhibits 4 and 5, under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an 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. The purpose of this exception 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, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of a governmental body. *See* Open Records Decision No. 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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 a governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

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[2]We note that the documents you have submitted as Exhibit 6 are identical to certain documents you have submitted as Exhibit 8 that are excepted under section 552.107 of the Government Code. Exhibit 6, therefore, may also be withheld under section 552.107. Thus, we need not address your remaining argument for this information.

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You contend that the remaining information consists of e-mails and draft documents related to discussions of "the policy that should be implemented and/or appropriate actions that the [u]niversity should take to address the rights of workers who produce [u]niversity licensed apparel." Based on your representations and our review, we find that the draft documents and portions of the e-mail communications reveal advice, opinions, or recommendations regarding the proposed policy. Thus, you have established that the deliberative process privilege is applicable to this information, which we have marked, and it may be withheld under section 552.111 of the Government Code. However, the remaining information appears to consist of general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the submitted information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, we find that this information is not excepted from disclosure under section 552.111, and it may not be withheld on that basis.

We note that some of the remaining information may be subject to sections 552.117 and 552.137 of the Government Code.[3] Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the

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[3]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular phone numbers provided and paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, pursuant to section 552.117(a)(1), if the employees at issue made timely elections to keep their information confidential, then the university must withhold the employees' personal information. Accordingly, we have marked the information that must be withheld under section 552.117(a)(1) to the extent that the information consists of the personal cellular telephone numbers or family member information of employees of the university who timely requested confidentiality for the marked information under section 552.024 of the Government Code.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses in the submitted information that the university must withhold under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

In summary, the university may withhold Exhibits 6 through 11 under section 552.107 of the Government Code and the information we have marked in Exhibits 4 and 5 under section 552.111 of the Government Code. The university must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent that the information consists of the personal cellular telephone numbers or family member information of employees of the university who timely requested confidentiality. The university must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their release. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath* , 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Paige Savoie

Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 323429

Enc. Submitted documents

c: Mr. Timothy J. O'Brien
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(w/o enclosures)