



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 30, 2009

Mr. Scott A. Kelly
The Texas A&M University System
Office of General Counsel
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2009-01230

Dear Mr. Kelly:

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# 334354 (TAMU PIR No. CC-08-126).

Texas A&M University-Corpus Christi (the "university") received a request for any e-mails related to the university's athletic department sent between May 1, 2008, and September 15, 2008, to or from university president Dr. Flavius Killebrew. You inform us that some of the requested information has been withheld pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You state that you will release some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.116, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the responsive information.²

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).

¹The United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. Accordingly, we will not address the applicability of FERPA to any of the requested records.

²We 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.

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 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, and lawyer representatives. 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 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).

Exhibit B-3 consists of e-mails and attachments sent among attorneys and legal assistants in the Texas A&M University System (the “system”) general counsel’s office, system employees, and attorneys in the Texas Attorney General’s office representing the system. You also state that these communications were made in confidence, in furtherance of the rendition of professional legal services to the university, and that the communications have remained confidential. Based on your representations and our review of the information at issue, we find that you have demonstrated the applicability of the attorney-client privilege to this information. Accordingly, we conclude that the university may withhold the information in Exhibit B-3 in its entirety pursuant to section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” 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, no writ); 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 that 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 that are severable from advice, opinions, and recommendations. 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). We also note that section 552.111 encompasses external communications with a third party with which a governmental body shares a privity of interest or a common deliberative process with respect to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990) (addressing statutory predecessor).

This office has also 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 assert that Exhibit B-1 contains information protected by the section 552.111 deliberative process exception. Upon review, we agree that section 552.111 is applicable to this information and the university may accordingly withhold Exhibit B-1 in its entirety under this exception.

Section 552.111 also encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22

S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You inform us that the university is a defendant in ongoing litigation and that the documents in Exhibit B-2 represent work product created pursuant to instructions from the university's legal representatives in response to this ongoing litigation. You have also included for our review a copy of a preservation notice and e-discovery notice letter sent to a system attorney by the attorney for the plaintiff in this litigation. Based on your representations and our review, we find that the university may withhold the information in Exhibit B-2 in its entirety under the attorney work product exception of section 552.111 of the Government Code.

Section 552.116 of the Government Code provides:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a

public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You claim that the Exhibit B-4 consists of audit working papers of an audit of the university's athletic department conducted by the university's Internal Audit Department. You explain that the audit was authorized under the Texas Internal Auditing Act, pursuant to chapter 2102 of the Government Code. *See id.* § 2102.007 (relating to the duties of an internal auditor); .005 (requiring state agencies to conduct internal audit programs); .003 (defining types of audits). Based on your representations and our review, we agree that Exhibit B-4 consists of audit working papers as defined in section 552.116(2). Accordingly, the university may withhold this information pursuant to section 552.116 of the Government Code.

You assert that the information you have marked within Exhibit B-5 is subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the 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. Gov't Code § 552.117. Section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See Open Records Decision No. 670 at 6 (2001)* (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024).

Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). We note that you have marked phone numbers, family information, and an address in Exhibit B-5 that belong to individuals who are not university employees. Section 552.117 is applicable only to information belonging to employees of the governmental body that receives the request. Thus, section 552.117 is inapplicable to the information we have marked and the university must release this information. We have also marked for release a city name, which is not sufficient to constitute an address for the purposes of section 552.117. The university must withhold the phone numbers and family information you have marked for university employees who, as you inform us, made timely elections to keep such information private.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note that some of the e-mail addresses you have marked pursuant to section 552.137 are work e-mail addresses belonging to employees of the Southland Conference. Section 552.137 does not protect the work e-mail addresses of employees of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). Thus, if the Southland Conference is an entity that provides services to the university under the terms of a contract, the university may not withhold the e-mail addresses we have marked under section 552.137. Other e-mail addresses that you have marked do belong to members of the public who, as you inform us, have not consented to release of their information. You further state that one of the e-mail addresses you have marked is a personal e-mail address of a university employee who has not consented to release of his information. Thus, the university must withhold the e-mail addresses we have marked pursuant to section 552.137 of the Government Code.

In summary, the university: (1) may withhold the entirety of Exhibit B-3 under section 552.107(1) of the Government Code, (2) may withhold the entirety of Exhibit B-1 pursuant to the deliberative process exception of section 552.111 of the Government Code, (3) may withhold the entirety of Exhibit B-2 under the attorney work product exception of section 552.111 of the Government Code, (4) may withhold the entirety of Exhibit B-4 under section 552.116 of the Government Code, (5) must withhold the information within Exhibit B-5 that we have marked pursuant to section 552.117 of the Government Code, and (6) must withhold the information within Exhibit B and Exhibit B-5 that we have marked pursuant to section 552.137 of the Government Code. The university must release the rest of the submitted information.

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 at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan T. Mitchell". The signature is stylized with a large initial "R" and "M".

Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/jb

Ref: ID# 334354

Enc. Submitted documents

cc: Requestor
(w/o enclosures)