



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2009

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-10533

Dear Ms. Chatterjee:

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# 350469.

The University of Texas Medical Branch at Galveston (the "university") received a request for all e-mails sent and received by a named employee between April 20, 2009 and May 11, 2009. You state the university has provided some of the requested information to the requestor. You claim some of the submitted e-mails are not subject to the Act. You also claim the submitted e-mails are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.1235, 552.117, and 552.137 of the Government Code. Furthermore, you indicate release of a portion of the submitted information may implicate the proprietary interests of the National Institutes of Health ("NIH"). Accordingly, you state the university notified NIH of the request and of its right to submit arguments to this office as to why the submitted research protocol 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 NIH. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

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

Initially, we address your contention some of the submitted e-mails are not public information subject to the Act. The Act applies to "public information," which is defined under 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.

Gov't Code § 552.002; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. You represent the content of the e-mails at issue does not relate to the official business of the university. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information, unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Based on your representations and our review, we find the e-mails you have marked do not pertain to the official business of the university, and, therefore, do not constitute public information as defined by section 552.002 of the Government Code. Thus, the university is not required to disclose this information under the Act.²

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 51.914 of the Education Code, which provides in part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

- (1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

²As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). As noted in Open Records Decision No. 651, the legislature is silent as to how this office or a court is to determine whether particular scientific information has “a potential for being sold, traded, or licensed for a fee.” Open Records Decision No. 651 at 9 (1997). Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has this potential. *See id.*; *but see id.* at 9 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988).

You seek to withhold some of the submitted e-mails under section 51.914. You contend the e-mails you have marked include draft proposals for grant funding related to scientific research and information regarding specific research involving viruses. You further contend the information at issue was developed by university researchers and has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review, we conclude portions of the e-mails at issue are confidential under section 51.914. As such, the university must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. However, you have failed to establish that any of the remaining information at issue reveals the substance of research developed at the university or was disclosed to the university under a contract or grant containing a provision prohibiting the university from disclosing the information. Consequently, the remaining information at issue may not be withheld under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

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). 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).

You assert some of the remaining e-mails consist of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between university staff and attorneys representing the university, and were to be kept confidential among the intended parties. Finally, you state the confidentiality of the communications has been maintained. Based on your representations and our review, we find the university has established the applicability of section 552.107 to the e-mails you have marked. Therefore, the university may withhold the marked e-mails under section 552.107 of the Government Code.

You assert some of the remaining e-mails are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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 section 552.111 excepts from disclosure only those internal communications consisting 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded a preliminary draft of a document 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 the e-mails at issue consist of communications between university officials regarding the university's policies related to, among other things, changes to the university's security and informed consent policies and grant proposals. Based on your arguments, we find you have sufficiently demonstrated how some of the information contained in the e-mails pertains to the university's policymaking processes. We also find this information contains the advice, recommendations, and opinions of university officials regarding these policy issues. Furthermore, you state the draft security and informed consent policies will be released to the public in their final forms. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to the draft security and informed consent policies and parts of the e-mails, all of which we have marked. Accordingly, the university may withhold the information we have marked under section 552.111 of the Government Code. You have failed to demonstrate, however, how the remaining information you seek to withhold reveals advice, recommendations, and opinions regarding policymaking issues. Consequently, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

Section 552.1235 of the Government Code excepts from disclosure "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). "Institution of higher education" is defined by

section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an "institution of higher education" as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. *See* Educ. Code § 61.003.

You seek to withhold portions of the remaining e-mails under section 552.1235. You contend the information you have marked either identifies or tends to identify donors to the university. Based upon your representations and our review, we agree the information you have marked identifies persons as actual donors to the university. Accordingly, we conclude the university must withhold the marked information under section 552.1235 of the Government Code.

You claim the remaining e-mails include information that may be protected under section 552.117 of the Government Code. Section 552.117(a)(1) 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone and pager numbers, provided the respective services are 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 telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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). The university may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

You have marked cellular telephone and pager numbers, as well as family member information, that you seek to withhold under section 552.117. You have not informed us, however, that any of the employees whose information is at issue timely chose to not allow public access to their personal information. Furthermore, you have not informed us whether or not they paid for their cellular telephone and pager services. Additionally, you have marked information that does not reveal an employee's home address or telephone number, social security number, or family information. Therefore, if the employees timely elected to withhold their personal information, the university must withhold the cellular telephone and pager numbers you have marked, as well as the family member information and cellular telephone numbers we have marked, pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely elect to withhold their personal information, then the university may not withhold any of the marked personal information under section 552.117(a)(1) of the Government Code. You have failed to demonstrate, however, the applicability of section 552.117 to the remaining information you have marked; thus, that information may not be withheld under section 552.117(a)(1) of the Government Code.

You claim the e-mail addresses you have marked in the remaining e-mails are protected under section 552.137 of the Government Code, which 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). 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. The marked e-mail addresses are not specifically excluded by section 552.137(c). We note, however, some of the marked e-mail addresses are either institutional e-mail addresses or are maintained by governmental bodies for their employees. Consequently, these addresses may not be withheld under section 552.137. Thus, the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

NIH claims portions of its research protocol, which is attached to one of the remaining e-mails, are protected by common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681-82. NIH claims the researchers' names and laboratory officials' names contained in the research protocol are protected by common-law privacy. NIH has failed to demonstrate, however, how these names are intimate or embarrassing. Consequently, the researchers' and laboratory officials' names may not be withheld on the basis of common-law privacy.

NIH claims the locations of research animals contained in its research protocol are excepted under section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA"), chapter 552 of the United States Code. In Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by a Texas agency or its political subdivision. Furthermore, this office has stated in numerous opinions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). Therefore, the research animal locations in NIH's research protocol may not be withheld under FOIA.

We note part of the remaining information appears to 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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

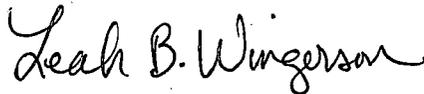
of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code, and the information you have marked under section 552.1235 of the Government Code. The university may withhold the e-mails you have marked under section 552.107 of the Government Code, and the information we have marked under section 552.111 of the Government Code. If the employees whose information is at issue timely elected to withhold their personal information, the university must withhold the marked cellular telephone numbers, pager numbers, and family member information pursuant to section 552.117(a)(1) of the Government Code. The university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The remaining information must be released in accordance with copyright law.³

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

³We note the remaining information contains a partial social security number, which you state the university will redact pursuant to section 552.147 of the Government Code. Gov't Code § 552.147(b) (a governmental body is authorized to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act).

Ref: ID# 350469

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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