



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 9, 2009

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

OR2009-14310

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# 357919.

Texas A&M University (the "university") received a request for all e-mails related to the Texas Institute for Genomic Medicine or the National Center for Therapeutics sent to or from named individuals during a specified period of time. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the requestor excluded personal e-mail addresses and phone numbers from the request. Thus, any of this information in the submitted information is not responsive to the instant request, and it need not be released. Accordingly, we do not address your argument under section 552.137 of the Government Code.

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<sup>1</sup>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.

Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You argue that portions of Exhibit B-1 are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914(1) of the Education Code. Section 51.914 of the Education Code provides in pertinent part as follows:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, 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[.]

Educ. Code § 51.914(1). As noted in Open Records Decision No. 651 (1997), 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 governmental body's assertion that the information has this potential. *See id; but see id.* at 10 (stating that 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 explain that the information at issue consists of fee schedules connected with the costs of performing specified research tasks and that "withholding the proposed fee schedules from competitors serves to preserve the potential value of scientific information created by an institution of higher education." You also assert that the information at issue has the potential for being sold, traded, or licensed for a fee. Although you explain, and the documents reflect, that biological products are developed by the university, the submitted fee schedules do not reveal the specifics of any actual research. Consequently, we determine that you failed to establish the applicability of section 51.914(1) to the information in Exhibit B-1, and the university may not withhold this information under section 552.101 of the Government Code.

You next assert the fee schedules at issue in Exhibit B-1 are excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

As noted above, the information at issue in Exhibit B-1 relates to fee schedules connected with the costs of performing specified research tasks. Although you indicate that release of this information would benefit the university's competitors and compromise its position in the marketplace, you have not provided any arguments explaining how the release of this information would cause a specific threat of actual or potential harm to the university's interests in a specific competitive situation. Thus, we conclude you have failed to establish the applicability of section 552.104 to the information at issue, and the university may not withhold any portion of the information in Exhibit B-1 under section 552.104 of the Government 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 Texas 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 state that the e-mails and attachments you have marked in Exhibit B-2 constitute communications between and amongst university staff and university attorneys that were made for the purpose of providing legal advice to the university. You have identified the parties to the communications. You state that these communications were made in confidence and confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the university may withhold the information you have marked under section 552.107 in Exhibit B-2.<sup>2</sup>

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” and encompasses the deliberative process privilege. Gov’t Code § 552.111; *see* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinions, and recommendations on policy matters in order to encourage frank discussion during the policymaking process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision Nos. 538 at 1-2 (1990), 460 at 3 (1987). 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, and opinions that reflect the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions include administrative and personnel matters of broad scope that affect the governmental body’s policy mission, but do not include routine internal

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<sup>2</sup>As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

administrative or personnel matters, as disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See* Open Records Decision No. 631 at 3 (1995); *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000). Furthermore, 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. However, if factual information is so inextricably intertwined with material involving advice, opinions, or recommendations 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 have 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 state that the information you have marked under section 552.111 contains the advice, opinions, and recommendations of university employees with respect to various policy issues such as business and marketing plans, the securing of funding, and the construction of facilities. You also state the university will release the final versions of the draft documents in Exhibit B-2. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the information for which you claim this exception. Therefore, the university may withhold the information we have marked under section 552.111. However, you have failed to demonstrate, and the information does not reflect on its face, that the remaining information for which you claim this exception consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, the university may not withhold any of the remaining information under the deliberative process privilege of section 552.111.

In summary, the university may withhold the information you have marked under section 552.107 of the Government Code in Exhibit B-2. The university may withhold the information we have marked under section 552.111 of the Government Code. The remaining information must be released to the requestor.

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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](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,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a long horizontal flourish extending to the right.

Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/jb

Ref: ID# 357919

Enc. Submitted documents

c: Requestor  
(w/o enclosures)