



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 2, 2011

Ms. Idolina Garcia  
Mr. Renaldo Stowers  
Office of General Counsel  
University of North Texas System  
1901 Main Street, Suite 216  
Dallas, Texas 75201-5222

OR2011-07802

Dear Ms. Garcia and Mr. Stowers:

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# 422475 (UNT PIR No. 11-079).

The University of North Texas System (the "system") received a request for e-mails between and among all regents, as well as e-mails between regents and the chancellor or the system's general counsel, regarding research, governance, academic governance, reforms, Governor Rick Perry or anyone on the governor's staff, and the Texas Public Policy Foundation or anyone on its staff, or a named individual; e-mail correspondence to and from regents and seven named individuals; the appointment files for all regents and everyone whose name has been put up for regent in the last five years; and any document listing all faculty salaries compiled by any member of the system staff in the last two years.<sup>1</sup> You state you will release some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note the system received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</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 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 is 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. *See* 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.*, 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. *See 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 the e-mails and attachments in Representative Sample A consist of communications between the system’s Vice Chancellor and General Counsel, who is responsible for providing legal advice and services to system officials, and system administrators and regents. You state these communications were made in the furtherance of providing legal advice on the drafting and revising of rules adopted by the system’s Board of Regents during the rule adoption process. You state that these communications were made in confidence and have remained confidential. Upon review, we find the information you have marked in Representative Sample A constitutes privileged attorney client communications. Accordingly, the system may withhold the information you have marked in Representative Sample A under section 552.107 of the Government Code.

You claim the information in Representative Samples B and C 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); see also 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 only those internal communications that consist of advice, opinions, recommendations 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. See *id.*; see also *City of Garland v. The 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).

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.

Upon review, we find you have failed to demonstrate how Representative Samples B and C, which consist of a draft of a request for proposals and a document relating to a conference call regarding a higher education initiative of the governor, constitute drafts of policymaking documents that will be released to the public in their final form. Accordingly, this information may not be withheld in its entirety under section 552.111 of the Government Code. However, we find you have established that portions of the information in Representative Samples B and C, which we have marked, consist of advice, opinion, or recommendations regarding policy matters of the system that may be withheld under section 552.111 of the Government Code. We find the remaining information at issue does

not constitute advice, opinion, or recommendations regarding policy matters, and it may not be withheld under section 552.111.

Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117 also encompasses a personal cellular telephone number, provided that the 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 telephone numbers provided and paid for by governmental body and intended for official use). You inform us the official at issue elected confidentiality of his personal information prior to the system's receipt of the request. Thus, system must withhold the information you have marked in Representative Sample D under section 552.117(a)(1) of the Government Code. However, the system may only withhold the official's cellular telephone number under section 552.117(a)(1) if the official concerned paid for the cellular telephone service with his own funds.

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).<sup>3</sup> *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). The system must withhold the marked e-mail addresses in Representative Samples A and D under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their release.<sup>4</sup>

In summary, the system may withhold the information you have marked in Representative Sample A under section 552.107 of the Government Code. The system may withhold the information we have marked in Representative Samples B and C under section 552.111 of the Government Code. The system must withhold the marked information in Representative Sample D under section 552.117(a)(1) of the Government Code, but may only withhold the official's cellular telephone number under that section if the official paid for the cellular

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

service with his own funds. The system 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 consent to their release. The remaining information must be released.

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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 422475

Enc. Submitted documents

c: Requestor  
(w/o enclosures)