



ATTORNEY GENERAL OF TEXAS  
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April 18, 2012

Ms. Zeena Angadicheril  
Office of General Counsel  
The University of Texas System  
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OR2012-05563

Dear Ms. Angadicheril:

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# 451099 (OGC# 141856).

The University of Texas at Austin (the "university") received a request for eight specified e-mails and eight categories of information pertaining to specified time periods and the use of current and former students' likenesses, three specified National Collegiate Athletic Association ("NCAA") legislation proposals, the NCAA's 2011 presidential retreat, and a named individual. You state the university does not have any information responsive to some of the requested information.<sup>1</sup> You state the university will release some information. You also state the university has received a letter from the requestor withdrawing his request for one of the categories of information and, therefore, the university is withdrawing the portion of its request for a ruling that pertains to the information the requestor no longer seeks.<sup>2</sup> You claim portions of the remaining requested information are not subject to the Act.

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We note that, as a result of the university's partial withdrawal, the submitted information we have marked is not responsive to the present request for information. The university need not release nonresponsive information in response to this request, and this ruling will not address it.

You also claim some of the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of some of the requested information may implicate the proprietary interests of the Big 12 Conference (the “Big 12”), the NCAA, the Collegiate Licensing Company (“CLC”), EA Sports Tiburon (“EA Sports”), IMG Communications, Inc. (“IMG”), and Division 1 Athletic Directors’ Association (“Division 1”). Thus, pursuant to section 552.305 of the Government Code, you notified these third parties of the request and of their rights to submit arguments to this office as to why the information at issue should not be released. Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments from an attorney for CLC. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Section 552.021 of the Government Code provides for public access to “public information.” Gov’t Code § 552.021. Section 552.002 of the Government Code defines public information 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.” *Id.* § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

You state the e-mails you have marked consist of information relating to the participation of the university’s women’s athletic director as a member of the NCAA’s Presidential Task Force on Commercial Activity in Intercollegiate Athletics (the “task force”). You state the e-mails at issue were prepared by or for the members of the task force and were given to the university’s women’s athletic director in her capacity as a member of the task force, and not in performance of her duties for the university. You state the e-mails at issue were not collected, assembled, or maintained in connection with the transaction of official university business. Upon review, we agree the e-mails you have marked do not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. *See* Gov’t Code § 552.021; *see also* 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). Thus, these e-mails are not

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<sup>3</sup>We 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.

subject to the Act, and the university is not required to release them in response to the request for information.

Next, we note some of the remaining information, which we have marked, is not responsive because it was created after the date the university received the instant request. The university need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, CLC claims that a portion of the remaining information at issue is not responsive to the instant request. We note that a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at (1990) (construing statutory predecessor). After reviewing the entire request for information, we find that the university has made a good-faith effort to relate the request for information to the information that the university maintains, and that the information at issue is responsive to the request at issue. Thus, we will examine CLC's arguments against disclosure of the information at issue.

The university and CLC claim portions of the remaining information at issue are protected by the attorney-client privilege. Section 552.107(1) excepts from disclosure "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]" Gov't Code § 552.107(1). Section 552.107(1), however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). As the university does not seek to withhold the memorandum CLC seeks to withhold pursuant to section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to this information, and the university may not withhold any of this information on that basis. *See* ORD 676. However, we will consider the university's arguments against disclosure of the information it seeks to withhold under section 552.107(1).

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* ORD 676 at 6-7. First, a governmental body must demonstrate 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 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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).

The university claims the information it has marked is protected by section 552.107(1) of the Government Code. You state the e-mails consist of attorney-client communications that were made between university employees and attorneys for the purpose of rendering professional legal services to the university. You state these communications were intended to be and remain confidential. 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 generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, these privileged e-mail strings include e-mails from non-privileged parties that are separately responsive to the instant request. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they are included, the university may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they are included, the university may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

The university seeks to withhold some of remaining information at issue, including the e-mails from the non-privileged parties in the otherwise privileged e-mail strings, under the deliberative process privilege. CLC seeks to withhold some of the remaining information at issue under the work product privilege. We address both the deliberative process privilege and the work product privilege under section 552.111 of the Government Code, which

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.” Gov’t Code § 552.111. Section 552.111 is a discretionary exception to public disclosure that protects a governmental body’s interests, and not those of a third party, and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived). Therefore, because the university does not raise the work product privilege in conjunction with section 552.111 for the memorandum CLC seeks to withhold, this information may not be withheld under the work-product privilege. However, we will consider the university’s arguments under the deliberative process privilege for the information it seeks to withhold.

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 (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, 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* ORD 561 at 9 (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You contend the remaining e-mails and attachments you have marked, including the e-mails from the non-privileged parties in the otherwise privileged e-mail strings, constitute communications to and from university employees that contain advice, opinions, and recommendations relating to university's policymaking processes in connection with the university's student athletes, athletic department, and athletic conference. Upon review, we agree the university may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information you seek to withhold consists of general administrative and purely factual information or has been sent to third parties who you have failed to demonstrate share a privity of interest or common deliberative process with the university. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information you seek to withhold, and the university may not withhold this information pursuant to the deliberative process privilege under section 552.111.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone numbers, social security number, family member information, and emergency contact 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.<sup>4</sup> Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses a cellular telephone number, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 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 a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). The university may only withhold information under section 552.117(a)(1) on behalf of an employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. We have marked cellular telephone numbers in the remaining information under section 552.117(a)(1) of the Government Code. The university must withhold these cellular telephone numbers under

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<sup>4</sup>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).

section 552.117(a)(1) to the extent the employees concerned timely elected under section 552.024 to keep their information confidential; however, the university may only withhold the cellular telephone numbers we have marked if the university does not pay for the cellular telephone services.

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 release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Upon review, we find the e-mail addresses we have marked in the remaining information at issue are not of the type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.

In summary, the e-mails the university has marked are not subject to the Act, and the university is not required to release them in response to the request for information. The university may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they are included, the university may not withhold them under section 552.107(1) of the Government Code. The university may withhold the information we have marked under section 552.111 of the Government Code. The university must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code to the extent the employees concerned timely elected under section 552.024 of the Government Code to keep their information confidential; however, the university may only withhold the cellular telephone numbers we have marked if the university does not pay for the cellular telephone services. The university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure. The university must release the remaining information at issue.<sup>5</sup>

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.

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<sup>5</sup>We note the information being released contains the requestor’s e-mail address, to which the requestor has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov’t Code § 552.137(b). Open Records Decision No. 684 (2009) is 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, without the necessity of requesting an attorney general decision. Accordingly, if the university receives another request from an individual other than this requestor, the university is authorized to withhold this requestor’s e-mail address under section 552.137 without the necessity of requesting an attorney general decision.

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,



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Open Records Division

SN/akg

Ref: ID# 451099

Enc. Submitted documents

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