



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2012

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

OR2012-13001

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# 462726 (OGC# 143768).

The University of Texas System (the "system") received a request for all communications sent or received by the system administration or board of regents relating to specified topics during a specified time period.¹ You state the system is releasing some information. You further state the system will redact information subject to section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code, and section 552.137 in accordance with Open Records Letter No. 684 (2009).² You claim that the submitted

¹You state the requestor modified her request in response to a cost-estimate provided by the system. *See* Gov't Code § 552.263(e-1) (modified request is considered received on the date the governmental body receives the written modification).

²Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.117, .024(c). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

information is excepted from disclosure under sections 552.107, 552.111, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you inform us some of the requested information, which we have marked, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-12007 (2012). In this ruling, we determined the system (1) may withhold certain information under sections 552.107(1) and 552.111 of the Government Code; (2) must withhold certain information under 552.1235 of the Government Code; and (3) must release the remaining information. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2012-12007 was based have changed, we conclude the system must continue to rely on Open Records Letter No. 2012-12007 as a previous determination and withhold or release the identical information in accordance with this ruling.⁴ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). However, we will consider your arguments for the information not subject to the prior ruling.

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 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). 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

³We assume the “representative sample” of information 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 those submitted to this office.

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

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.*, 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, 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).

You explain the information you have marked consists of confidential communications between attorneys for the system and system employees and officials. You further state that these communications were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree this information constitutes privileged attorney-client communications. Thus, the system may generally withhold the information you have marked under section 552.107(1) of the Government Code.⁵ However, we note these privileged e-mail strings include e-mails from a party that you have not identified as privileged. Accordingly, if these e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings in which they are included, then the system may not withhold the communications with the non-privileged party under section 552.107(1).

You seek to withhold some of the remaining information at issue, including the e-mails from the non-privileged party in the otherwise privileged e-mail strings, under section 552.111 of the Government Code. Section 552.111 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. 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*

⁵As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 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 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 has also concluded 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 Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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* ORD 561.

You state some of the remaining information contains the deliberations of employees and officials at the system and the system's component institutions recommending changes and revisions to a range of policy issues. You state the submitted draft documents will be released in their final form. Accordingly, the system 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 whom you have failed to demonstrate share a privity of interest or common deliberative process with the system. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information you seek to withhold, and the system may not withhold this information pursuant to the deliberative process privilege under section 552.111 of the Government Code.

Section 552.1235 of the Government Code excepts from disclosure "[t]he 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 information under section 552.1235. You state the information you have marked pertains to individuals who are system donors and who have not given the system permission to release their names and other identifying information. Based upon your representations and our review, we agree the portions of the remaining information you have marked identify persons who are donors to the system. Accordingly, we conclude the system must withhold the information you have marked under section 552.1235 of the Government Code.

In summary, the system must rely on Open Records Letter No. 2012-12007 as a previous determination and withhold or release the information subject to that ruling, which we have marked, in accordance with it. The system may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1). The system may withhold the information we have marked under section 552.111 of the Government Code. The system must withhold the information you have marked under section 552.1235 of the Government Code. 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, 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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 462726

Enc. Submitted documents

c: Requestor
(w/o enclosures)