ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2013

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

OR2013-08831

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# 488449 (OGC Nos. 148757, 148847, and 148850).

The University of Texas System (the "system") received three requests from different requestors for specified correspondence sent or received by ten named individuals during a specified time period.[1] You inform us the system will release some of the requested information. You also inform us the system will redact certain information under section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Letter No. 684 (2009).[2] You claim a portion of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.106,

[1]You inform us the system sought and received clarification of the requests. *See* Gov't Code § 552.222(b) (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 governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

[2]Section 552.117 of the Government Code excepts 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. *See* Gov't Code § 552.117. 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 id.* §§ 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.

552.107, 552.111, 552.116, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

Initially, we note you have marked portions of the submitted information as not responsive to the present requests for information. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to these requests.

Next, you contend a portion of the responsive information is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as consisting of

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
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> (1) by a governmental body; or
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> (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, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You inform us the information at issue consists of a personal message that has no connection with the system's business and constitutes incidental use of e-mail by a system employee and official. You also inform us this information was not collected or assembled and is not maintained pursuant to any law or ordinance or in connection with the transaction of system business. You state the system allows for incidental use of e-mail by employees and officials. Based on your representations and our review of the information at issue, we find this information does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (section552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude the information at issue, which you have marked, is not subject to the Act and need not be released in response to the present requests for information.

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[3]We 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.

Next, you inform us some of the responsive information was the subject of five previous requests for rulings, in response to which this office issued Open Records Letter Nos. 2013-06341 (2013), 2013-06653 (2013), 2013-06785 (2013), 2013-06911 (2013), and 2013-06993 (2013). In Open Records Letter No. 2013-06341, we ruled the system may withhold the information at issue under section 552.107(1) of the Government Code. In Open Records Letter No. 2013-06653, we ruled the system may withhold the information the system marked under sections 552.107(1) and 552.111 of the Government Code and must release the remaining information. In Open Records Letter No. 2013-06785, we ruled the system (1) must withhold the information the system marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code; (2) may withhold the information the system marked under section 552.107(1); and (3) must release the remaining information. In Open Records Letter No. 2013-06911, we ruled (1) the system may generally withhold the information the system marked under section 552.107(1); however, to the extent the e-mails we marked exist separate and apart from the otherwise privileged e-mail strings in which they are included, then the system may not withhold this information on that basis; (2) the system may withhold the information we marked under section 552.111; (3) to the extent the employees whose information we marked under section 552.117(a)(1) of the Government Code timely elected confidentiality under section 552.024 of the Government Code, the system must withhold this information under section 552.117(a)(1); (4) the system must withhold the e-mail address we marked under section 552.137 of the Government Code; and (5) the system must release the remaining information. In Open Records Letter No. 2013-06993, we ruled the system may withhold the information the system marked under sections 552.116, 552.107(1), and 552.111 of the Government Code and must release the remaining information. As we have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2013-06341, 2013-06653, 2013-06785, 2013-06911, and 2013-06993 were based have changed, the system may rely on these rulings as previous determinations and withhold or release any identical responsive information, a portion of which we have marked, in accordance with them.[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 that information is or is not excepted from disclosure). To the extent the remaining responsive information is not identical to the information that was the subject of Open Records Letter Nos. 2013-06341, 2013-06653, 2013-06785, 2013-06911, and 2013-06993, we will consider the exceptions you claim.

Section 552.101 of the Government Code excepts 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 other statutes make confidential, such as section 51.971 of the Education Code, which provides, in part:

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[4]As our ruling is dispositive with respect to the information we have marked, we need not address your arguments against its disclosure.

> (e) Information is excepted from disclosure under [the Act] if it is collected or produced:
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> > (1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]

Educ. Code § 51.971(e)(1). Section 51.971 defines a compliance program as a process to assess and ensure compliance by officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies. *Id.* § 51.971(a)(1). You inform us the information at issue pertains to an ongoing compliance investigation being conducted by the system's Office of General Counsel. You also inform us the purpose of this investigation is to assess and ultimately ensure the system has complied with all applicable laws, rules, regulations, and policies. Further, you represent the release of the information at issue at this time would interfere with, and potentially compromise, the investigation. Based on your representations and our review, we agree the information at issue pertains to the system's compliance program for purposes of section 51.971. *See id.* § 51.971(a). Accordingly, we conclude the system must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code.[5]

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You claim some of the information at issue is protected by common-law privacy. Upon review, we agree the information we have marked is highly intimate or embarrassing and is not of legitimate concern to the public. Thus, the system must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.[6] However, we find you have failed to demonstrate any of the remaining information you have marked is highly intimate or embarrassing and not of legitimate concern to the public.

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

[6]As our ruling for this information is dispositive, we need not address your remaining argument against its release.

Accordingly, none of this information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first is the interest in independence in making certain important decisions related to the "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); *see also* ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); *see also* ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find you have failed to demonstrate how any portion of the information you have marked falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the system may not withhold any of this information under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.105(1) of the Government Code excepts from disclosure information relating to "the location of real or personal property for a public purpose prior to public announcement of the project[.]" Gov't Code § 552.105(1). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Record Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You assert the information at issue concerns the system's acquisition of certain real property via donation and the transaction relating to the relevant property is not complete and remains pending. You state the system has made a good-faith determination that release of this information at this time would damage and compromise the system's negotiating position with respect to any transaction involving the property. Based on your representations and

our review, we conclude the system may withhold the information you have marked under section 552.105(1) of the Government Code.[7]

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 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* 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. *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, 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). 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).

You explain the information at issue consists of confidential communications between attorneys for the system and system employees and officials. You inform us these communications were made in furtherance of the rendition of professional legal services to the system. You also inform us the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted

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[7]As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

information, we agree the information at issue 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. However, we note one of the privileged e-mail strings includes an e-mail from a non-privileged party that is separately responsive to the instant requests. Accordingly, if this e-mail, which we have marked, exists separate and apart from the otherwise privileged e-mail string in which it is included, then the system may not withhold the non-privileged e-mail we have marked under section 552.107(1).[8]

Section 552.111 of the Government Code excepts from disclosure "[a]n 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 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 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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 intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendations with regard to the form and content of the final document, so as to be excepted from

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[8]As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

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 inform us some of the remaining information at issue consists of advice, opinion, or recommendations of employees and officials at the system regarding policy issues. Further, this information contains a draft document, which you state is intended for release in its final form. Based on your representations and our review, we find the system may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information you have marked on this basis consists of either general administrative information that does not relate to policymaking, information that is purely factual in nature, or information communicated with a non-privileged party. Thus, we find you have failed to demonstrate the applicability of section 552.111 to this information. Accordingly, we find none of the remaining information you have marked may be withheld under section 552.111.

Section 552.116 of the Government Code provides:

> (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.
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> (b) In this section:
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>> (1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.
>>
>> (2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the system is an institution of higher education as defined by section 61.003 of the Education Code. You contend the information at issue was created in furtherance of an internal audit conducted by the system regarding development activities of its institutions. You inform us audits such as this are authorized by the Texas Internal Auditing Act, chapter 2102 of the Texas Government Code. *See id.* §§ 2102.003 (defining types of audits), .005 (requiring state agencies to conduct internal audits), .007 (relating to duties of internal auditor). Based on your representations and our review, we agree the information at issue consists of audit working papers as defined in section 552.116(b)(2). Accordingly, the system may withhold the information you have marked under section 552.116 of the Government Code.

Section 552.1235 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[.]" *Id.* § 552.1235(a). For purposes of this exception, "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 meaning "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." Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See* Gov't Code § 311.005. "Person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

You inform us the information at issue identifies a donor to the one of the system's component institutions who has not given permission to release her name or other identifying information. However, we note the individual at issue is publicly identified as a donor on the website of the institution at issue. Accordingly, we conclude the system may not withhold the information you have marked under section 552.1325 of the Government Code.

In summary, the personal communication you have marked is not subject to the Act and need not be released in response to the present requests for information. The system may rely on Open Records Letter Nos. 2013-06341, 2013-06653, 2013-06785, 2013-06911, and 2013-06993 as previous determinations and withhold or release any identical responsive information, a portion of which we have marked, in accordance with these rulings. The system must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system may withhold the information you have marked under section 552.105(1) of the Government Code. The system may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail we have marked exists

separate and apart from the otherwise privileged e-mail string in which it is included, then the system may not withhold the marked non-privileged e-mail on that basis. The system may withhold the information we have marked under section 552.111 of the Government Code. The system may withhold the information you have marked under section 552.116 of the Government Code. As no further exceptions to disclosure of the remaining responsive information are raised, the system must release it.

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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 488449

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)