



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2013

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

OR2013-16766

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# 499035 (OGC# 150594).

The University of Texas at Austin (the "university") received a request for all communications involving three named university employees and officials and the University Development Office referencing four named regents of the University of Texas System (the "system") over a specified time period.¹ You state the university will release some of the requested information. You state you will redact information subject to section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code.² You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United

¹We note the university asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Section 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* § 552.024(c).

States Code.³ You claim portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.1235, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

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:

(e) Information is excepted from disclosure under [the Act], if it is collected or produced:

(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 the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies[.]” *Id.* § 51.971(a)(1). We note the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You assert the information you have marked pertains to an investigation into allegations of misconduct by university employees and officials. You state the investigation is being conducted by the university’s Office of General Counsel and the system-wide Compliance Office. You further state the purpose of the review is to assess and ultimately ensure compliance with all applicable law, rules, regulations, and policies. Based on your representations and our review, we agree the information at issue pertains to the university’s compliance program for purposes of section 51.971. *See id.* § 51.971(a). You inform this office the information at issue pertains to an ongoing compliance investigation and release of the information at this time would interfere with, and potentially compromise, that investigation. Accordingly, we conclude the

³ The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁴We 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 that those records contain substantially different types of information than that submitted to this office.

university 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.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Upon review, we find the information the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university has failed to demonstrate, however, how the remaining information it has marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the university may not withhold any portion of the remaining information it has marked under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). 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); 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). In this instance, you have not demonstrated how constitutional privacy applies to the remaining information. Consequently, the university may not withhold the remaining information under section 552.101 in conjunction with constitutional privacy.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107. 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 state the information you have marked consists of communications between university and system attorneys, personnel, employees, officials, and representatives. You inform us these communications were made in furtherance of the rendition of professional legal services to the university. You also inform us the communications were intended to be confidential and their 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(1) of the Government Code.⁵

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

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. 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 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* Open Records Decision Nos. 615 at 5, 137 (1976) (discussing pre-decisional and post-decisional documents). 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 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 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 No. 561 at 9 (1990) (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* ORD 561.

You seek to withhold some of the remaining information under section 552.111 of the Government Code. You state some of the remaining information consists of advice, opinions, and recommendations of employees, officials, and advisors of the university and the system regarding policymaking matters. You explain the advisors at issue are members of university advisory boards and councils who, in their roles as advisors, provide advice, opinions, and recommendations to the university and share a privity of interest and common deliberative process with the university. You further state portions of the information at issue consist of draft documents that are intended to be released in their final form. Upon review, we find the university may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is administrative or purely factual in nature or was communicated with individuals with whom you have not established the university has a privity of interest. Accordingly, the university may not withhold any portion of the remaining information 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 “[i]nstitution 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 state the information you have marked pertains to individuals who are donors to the university and who have not given the university permission to release their names and other identifying information in this instance. Based on your representations and our review, we agree the information you have marked identifies persons who are donors to the university. Accordingly, the university must withhold the information you have marked under section 552.1235 of the Government Code.

Section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. You seek to withhold a teleconferencing access code. You explain the access code, and the accompanying telephone number, do not change and can be used to access teleconferencing accounts of the university in order to arrange long distance telephone calls. Based on your arguments and our review, we conclude the information you have marked, and the additional information we have marked, constitute access device numbers for purposes of section 552.136. Accordingly, the university must withhold the information you have marked and the information we have marked under section 552.136 of the Government Code.

You state you will redact the e-mail addresses you have marked in the remaining information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684.⁶ We have marked additional e-mail addresses in the remaining information that are subject to section 552.137, which 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). *Id.* § 552.137(a)-(c). The marked e-mail addresses are not a type specifically excluded by section 552.137(c). You state the university has not received consent to release the e-mail addresses at issue. Accordingly, the university must withhold the e-mail addresses you have marked and the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the university 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

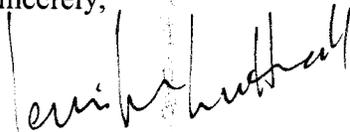
⁶Open Records Decision No. 684 is a previous determination issued by this office to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Education Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university may withhold the information you have marked 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 information you have marked under section 552.1235 of the Government Code. The university must withhold the information you have marked and the information we have marked under sections 552.136 and 552.137 of the Government Code. The university must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 499035

Enc. Submitted documents

c: Requestor
(w/o enclosures)