



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 17, 2014

Ms. Ana Vieira  
Attorney & Public Information Coordinator  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2014-06422

Dear Ms. Vieira:

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# 520197 (OGC# 153865).

The University of Texas System (the "system") received a request for e-mail and text messages from a specified time period sent to or received from any of seven named system employees and officials.<sup>1</sup> You inform us you do not maintain information pertaining to three of the named individuals.<sup>2</sup> You inform us you have released some of the requested information to the requestor. You state you will redact personal e-mail addresses subject to section 552.137 of the Government Code in accordance with Open Records Decision No.

---

<sup>1</sup>We note the system sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>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).

684 (2009) and information subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024 of the Government Code.<sup>3</sup> You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.143 of the Government Code. You also state the release of the requested information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, you notified the University of Texas Investment Management Company (“UTIMCO”) of the request and of the company’s right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from UTIMCO. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>4</sup>

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. 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 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

---

<sup>3</sup>Open Records Decision No. 684 (2009) is a previous determination 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 opinion. *See* ORD 684. Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2).

<sup>4</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.

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 that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked consists of confidential communications exchanged between attorneys for the system and its clients for the purpose of providing legal advice. You state these communications were intended to be confidential and the confidentiality has been maintained. However, some of the information you have marked consists of communications with individuals you have not identified as privileged parties. Therefore, we find you have failed to demonstrate this information, which we have marked, documents a privileged attorney-client communication. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information. Accordingly, except for the information we have marked, the system may withhold the submitted information under section 552.107(1) of the Government Code.<sup>5</sup>

Section 552.111 of the Government Code 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 of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.-San Antonio 1982, writ ref’d n.r.e.); *see also Open Records Decision No. 538 at 1-2 (1990)*.

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, opinions,

---

<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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).

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 at 9.

You assert the remaining information consists of advice, suggestions, and recommendations from system employees and officials regarding policy issues. However, we find you have failed to demonstrate how the system shares a privity of interest or common deliberative process with some of the individuals in the communication at issue. Thus, we find you have not demonstrated how this communication consists of advice, opinions, or recommendations pertaining to policymaking matters of the system. Accordingly, we conclude the system may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.143 provides, in part, the following:

- (a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.
- (b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund

is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

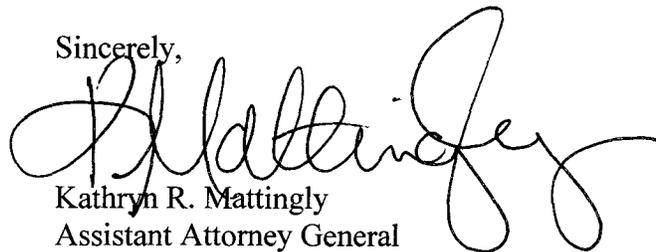
Gov't Code § 552.143 (a), (b). You inform us UTIMCO is an investment advisor to the system's Board of Regents (the "Board of Regents"). You further inform us that as an investment advisor, UTIMCO is authorized to invest assets under the control and management of the Board of Regents. You state the information you have marked consists of pre-investment due diligence information prepared by UTIMCO staff or a private investment fund in order to evaluate possible investments. UTIMCO informs us the information at issue relates to funds in which investments were not made, and, therefore, the information does not consist of information subject to section 552.0225 of the Government Code. *See id.* § 552.0225(b) (listing categories of information held by governmental body relating to its investments that are public and not excepted from disclosure under Act). Based on your representations and our review, we agree the system must withhold the information you have marked under section 552.143(b) of the Government Code.

In summary, except for the information we have marked, the system may withhold the submitted information under section 552.107(1) of the Government Code. The system must withhold the information you have marked under section 552.143 of the Government Code. The system must release the remaining information to the requestor.

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](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,



Kathryn R. Mattingly  
Assistant Attorney General  
Open Records Division

KRM/bhf

Ref: ID# 520197

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Melynda Shepard  
Public Information Coordinator  
The University of Texas Investment Management Company  
401 Congress Avenue, Suite 2800  
Austin, Texas 78701  
(w/o enclosures)