



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

July 22, 2015

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

OR2015-14972

Dear Ms. Welter:

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# 573574 (OGC# 161667).

The University of Texas System (the "system") received a request for the written and electronic calendar for a named system employee for the time period of June 1, 2013 until December 31, 2013.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.102, 552.107, and 552.111 of the Government Code.<sup>2</sup> You also assert portions of the submitted information are not public information subject to the

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<sup>1</sup>The requestor narrowed the time frame of his request and agreed the system may exclude personal entries, such as doctor's appointments and family events. *See* Gov't Code 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify or narrow request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (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). Therefore, the excluded information, some of which you have marked, is not responsive to the request and the system need not release such information to the requestor.

<sup>2</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 that those records contain substantially different types of information than that submitted to this office.

Act. We have considered your assertion and the exceptions you claim and reviewed the submitted information.<sup>3</sup>

Initially, we address your assertion that portions of the submitted information are 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

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002. Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the information you have marked consists of calendar entries that are entirely personal in nature and have no connection with the system’s business and constitute incidental use of the system’s resources. You state the system allows for incidental use of such resources by employees and officials. You further state the use of the system’s resources to create and maintain the marked information was *de minimis*. See 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). Based on your representations and our review, we agree the information you have marked does not constitute “information that is written, produced, collected, assembled, or maintained under

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<sup>3</sup>You have marked portions of the submitted information as excepted from disclosure under sections 552.117 and 552.136 of the Government Code and have not asked for our ruling on these markings. A governmental body may redact information under these provisions without the necessity of requesting a decision from the attorney general. See Gov’t Code §§ 552.024(c), .136(c).

a law or ordinance or in connection with the transaction of official business” by or for the system. *See* Gov’t Code § 552.002. Thus, we find the calendar entries you have marked are not subject to the Act and need not be released in response to the present request for information.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). You state the information at issue includes the birth date of a current system employee. After review of the information at issue, we conclude the system must withhold the marked information which discloses a system employee’s date of birth under section 552.102(a) of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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 “to facilitate 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)(A), (B), (C), (D), (E). 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. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 system states the marked submitted information reveals communications between attorneys at the system, outside counsel for the system, or their representatives and their clients, including system institutions. You have identified the parties to the communications and explained those parties' roles within the attorney-client privilege. You state the issues of concern raised in the documents are within the course and scope of the parties' contract and/or service to the system. Finally, you argue the marked information relates to issues communicated by system attorneys and system institutions to provide legal advice or by clients seeking legal advice within the course and scope of the parties' employment or official capacity. Upon review, we find the system has demonstrated the applicability of the attorney-client privilege to the marked information. Thus, the system may withhold the marked information under section 552.107(1) of the Government Code.

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, writ ref'd n.r.e.); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615*, 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, 364 (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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *See Open Records Decision No. 313 at 3 (1982)*.

The system states the marked information is protected from disclosure under section 552.111 because the information is advice, recommendations, and opinion regarding policy matters. The system states the information “contain[s] the deliberative process by which employees and officials at the system and its institutions discussed issues affecting the policy mission of the system and its institutions, including new ways to improve collaboration between system institutions and certain federal agencies and governmental issues surrounding historically underutilized business.” You also argue any factual information is “not only intertwined with the material containing advice, opinion, or recommendation, but any such factual information reflects what the employees found to be of importance in evaluating information related to the matters . . . and reflects employees’ advice, opinion, and recommendation.”

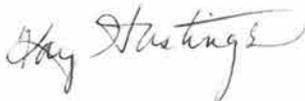
Upon review, we find, except where indicated, the system may withhold the marked information section 552.111. We further find the system has failed to demonstrate the information we indicated is excepted under section 552.111. Accordingly, the system may not withhold the information we indicated under section 552.111 of the Government Code.

In summary, the system must withhold the marked information under section 552.102(a) of the Government Code. The system may withhold the marked responsive information under sections 552.107(1). Except where indicated, the system may withhold the marked responsive information under section 552.111 of the Government Code. The system must release the remaining responsive 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](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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/sdk

Ref: ID# 573574

Enc. Submitted documents

c: Requestor  
(w/o enclosures)