



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 24, 2015

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

OR2015-15121

Dear Ms. Ayala:

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# 572866 (OGC# 161335).

The University of Texas of the Permian Basin (the "university") received a request for any and all e-mails containing certain words or phrases since January 1, 2015.¹ You state the university will release some information to the requestor. You state the university will withhold student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² Further, you

¹We note the university sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the university received the required deposit on May 6, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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. A copy of this letter may be found on the Office of the Attorney General's website:

state the university will withhold information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code, motor vehicle record information pursuant to section 552.130(c) of the Government Code, access device numbers pursuant to section 552.136(c) of the Government Code, and e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ You claim some of the submitted information is not subject to the Act. You claim portions of the remaining information are excepted from disclosure under sections 552.101, 552.104, 552.106, 552.107, 552.108, 552.111, and 552.1235 of the Government Code.⁴ Additionally, you state release of portions of the submitted information may implicate the interests of certain third-party governmental bodies, namely: the Richardson Police Department, the Ector County Independent School District Police Department, the Duncanville Police Department, the Brownsville Police Department, the Austin Police Department, the Edinburg Police Department, and the Howard County Sheriff's Office. Accordingly, you state you have notified these governmental bodies of the request for information and of each party's right to submit arguments to this office as to why the submitted information should not be released.⁵ *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). You also state because the release of some of the submitted information may implicate the

<http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). 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 current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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.

⁴You acknowledge, and we agree, the university did not comply with the requirements of section 552.301 of the Government Code in raising section 552.101 in conjunction with section 161.032 of the Health and Safety Code. *See* Gov't Code § 552.301(b). Nonetheless, section 552.101 is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the university's arguments under section 552.101 in conjunction with section 161.032 of the Health and Safety Code.

⁵As of the date of this ruling, we have not received comments from any of the interested third-party governmental bodies.

proprietary interests of EverFi and LawRoom, you have notified EverFi and LawRoom of the request for information and of each party's right to submit arguments to this office as to why the submitted information should not be released. *See id.* § 552.305; *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁶

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from EverFi or LawRoom explaining why the submitted information should not be released. Therefore, we have no basis to conclude either third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest EverFi or LawRoom may have in the information.

Next, we address your assertion portions of the responsive 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

⁶We 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.

(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 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). We understand the submitted passwords you have marked have no significance other than their use as tools for the maintenance, manipulation, or protection of public information. Further, you inform us the remaining information you have marked consists of e-mails that are entirely personal in nature, have no connection with the university's business, and constitute incidental use of the university's resources. You state the university allows for incidental use of such resources by employees and officials. You further state the use of the university'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 of the information at issue, we agree the information you have marked does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. See Gov't Code § 552.002. Therefore, we conclude the passwords and e-mails you have marked are not subject to the Act. We note the requestor specifically excludes from his request any information that is not subject to the Act. Thus, the information you have marked is not responsive to the instant request and need not be released in response to the present request for information.⁷

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101, Section 552.101 encompasses article 62.005 of the Code of Criminal Procedure. You state the responsive information contains sex offender registration information subject to article 62.005(b). Article 62.051 of the Code of Criminal Procedure requires a sex offender registrant to provide the following information for the Texas Department of Public Safety ("DPS") sex offender registration database: the person's full name; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver's license number; shoe size; home address; each alias; home, work, or cellular telephone number; a recent color photograph, or if possible, an electronic image of the person; a complete set of fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation,

⁷As we are able to make this determination, we need not address the university's arguments against disclosure of this information.

or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; the identification of any online identifier established or used by the person; and any other information required by the department. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person's social security number; driver's license number; home, work, or cellular telephone number; the identification of any online identifier established or used by the person; all information required by DPS outside of the enumerated categories of information including any information regarding an employer's name, address, or telephone number; and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). Thus, the university must withhold or release the information subject to article 62.005 of the Code of Criminal Procedure, which you have indicated, in accordance with article 62.005(b) of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI DPS maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Section 411.083 authorizes the DPS to disseminate CHRI to "noncriminal justice agencies authorized by ... state statute to receive criminal history record information[.]" *Id.* § 411.083(b)(2). Section 411.094 of the Government Code provides in part:

(b) The Texas Higher Education Coordinating Board and each institution of higher education are entitled to obtain from the [DPS] criminal history record information maintained by the [DPS] that relates to a person who is an applicant for a security-sensitive position at the coordinating board or institution, as applicable.

(c) Criminal history record information obtained under Subsection (b) may be used only for the purpose of evaluating applicants for employment in security-sensitive positions.

(d) Criminal history record information received under Subsection (b) may not be released or disclosed to any person except on court order or with the

consent of the person who is the subject of the criminal history record information.

Id. § 411.094(b)-(d). You state the university is an institution of higher education. *Id.* § 411.094(a)(1) (defining “institution of higher education”); Educ. Code § 61.003(8) (defining “institution of higher education”). You inform us the university obtained some of the CHRI at issue for the purpose of evaluating the individual’s application for a security-sensitive position at the university. *See* Gov’t Code § 411.094(a)(2) (defining “security-sensitive position”). Further, the remaining information you have indicated consists of confidential CHRI generated by the TCIC. Thus, the university must withhold the CHRI you have marked and indicated under section 552.101 in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state the information you have indicated was used or developed in an investigation of alleged or suspected child abuse by the University of Texas at Tyler Police Department (“UT Tyler PD”), which you state serves its institution in the law enforcement function pursuant to the authority granted to the University of Texas System (the “system”) Board of Regents by section 51.203 of the Texas Education Code to hire and commission police officers. *See* Educ. Code § 51.203. Thus, we agree this information falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201 as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code). You state the system and its institutions have not adopted a rule that governs the release of this type of information. Based on our review, we determine the information at issue is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision

No. 440 at 2 (1986) (predecessor statute). Therefore, the university must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.⁸

Section 552.101 of the Government Code also encompasses chapter 611 of the Health and Safety Code. Section 611.002 provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Upon review, we find some of the information you have marked and indicated consists of mental health records for purposes of chapter 611 of the Health and Safety Code. However, we find the remaining information at issue, which we have marked for release, does not constitute mental health records subject to chapter 611 of the Health and Safety Code and the university may not withhold that information under section 552.101 of the Government Code on that basis. Accordingly, except for the information we have marked for release, the university must withhold the information you have marked and indicated under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code, which provides, in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, or hospital authority are not subject to disclosure under [the Act].

⁸As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Id. § 161.032(a), (c), (f). You argue some of the responsive information consists of medical committee documents subject to section 161.032. Section 161.031(a) defines a “medical committee” as “any committee . . . of . . . a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Section 161.0315 provides “[t]he governing body of a hospital [or] university medical school or health science center . . . may form . . . a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes,” but does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *See Jordan*, 701 S.W.2d at 647-48; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 161.032). Further, section 161.032 does not make confidential “records made or maintained in the regular course of business by a . . . university medical center or health science center[.]” Health & Safety Code § 161.032(f); *see also McCown*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 of the Health and Safety Code is clear signal records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See McCown*, 927 S.W.2d at 9-10.

You explain the responsive documents include discussions of the university’s Institutional Review Board, also known as its Committee For the Protection of Human Subjects (“IRB”). You state the IRB is a medical committee established pursuant to federal law in order “to review, to approve the initiation of, and to conduct periodic review of, biomedical research

involving human subjects.”⁹ 21 C.F.R. § 56.102(g). You further state the communications at issue pertain to the IRB’s deliberations regarding a specific matter. Based on these representations and our review, we conclude the university must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation or public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). We note the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate the remaining information you have marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the university may not withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type

⁹See 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established “Institutional Review Board” to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the information you have marked falls within the zones of privacy. Therefore, the university must withhold the information you have marked under section 552.101 on the basis of constitutional privacy.

Section 552.104(a) of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *9 (Tex. June 19, 2015). You state the information you have marked relates to a competitive bidding situation pertaining to the university's solicitation for Title IX training for first-year students. You explain that although the current bidding process has closed and a winner was selected, a contract has not yet been executed for the project at issue. After review of the information at issue and consideration of the arguments, we find you have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information you have marked under section 552.104(a) of the Government Code.

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 "to facilitate 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)(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. Lastly, 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. *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).

The university states the information it has marked consists of communications involving university and system attorneys and staff. The university states the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the university and these communications have remained confidential. Upon review, we find the university has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information you have indicated under section 552.107(1) of the Government Code.¹⁰

Section 552.108(a) of the Government Code provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov’t Code § 552.108(a)(1), (2). Section 552.108(a)(1) is applicable to information pertaining to a pending or active criminal investigation or prosecution, while section 552.108(a)(2) protects law enforcement records pertaining to a criminal investigation or prosecution that concluded in a final result other than a conviction or a deferred adjudication.

¹⁰As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state some of the information you have indicated relates to an investigation by the University of Texas Medical Branch at Galveston Police Department (“UTMB PD”), which you state, like UT Tyler PD, serves its institution in the law enforcement function pursuant to the authority granted to the system Board of Regents by section 51.203 of the Texas Education Code to hire and commission police officers. *See* Educ. Code § 51.203. You state UTMB PD seeks to withhold the information at issue because it relates to an active, ongoing criminal case. Based on these representations and our review, we agree section 552.108(a)(1) is applicable to the information at issue. Further, you state the remaining information you have indicated relates to a closed criminal investigation by the UT Tyler PD that did not result in conviction or deferred adjudication. Accordingly, we conclude section 552.108(a)(2) is applicable to that information. Therefore, the university may withhold the information you have indicated under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code.¹¹

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov’t Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Although you have marked some of the remaining responsive information as subject to section 552.108(b)(1) of the Government Code, you have not provided any arguments explaining how release of the information at issue would interfere with law enforcement. *See* Gov’t Code §§ 552.301, .302. Therefore, the university may not withhold any of the information at issue under section 552.108(b)(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).

¹¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In Open Records Decision No. 615, we determined section 552.111 exempts 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).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

The university states the information at issue consists of advice, opinions, and recommendations relating to the university's policymaking. The university also states the information at issue contains draft documents that will be released to the public in final form. Upon review, we find the university may withhold the information you have marked under section 552.111 of the Government Code.

Section 552.1235 of the Government Code exempts 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). 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 state the information you have marked identifies donors. Thus, the university must withhold the donors' identifying information you have marked under section 552.1235 of the Government Code.

You state some of the remaining responsive information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Open Records Decision No. 180 at 3 (1977)*. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see Open Records Decision No. 109 (1975)*. If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the information you have marked as not subject to the Act is not responsive to the instant request and need not be released in response to the present request for information. The university must withhold or release the information subject to article 62.005 of the Code of Criminal Procedure, which you have indicated, in accordance with article 62.005(b) of the Code of Criminal Procedure. The university must withhold the CHRI you have marked and indicated under section 552.101 in conjunction with chapter 411 of the Government Code and the information you have indicated under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Except for the information we have marked for release, the university must withhold the information you have marked and indicated under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code. The university must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety 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 must withhold the information you have indicated under section 552.101 in conjunction with constitutional privacy. The university may withhold the information you have marked and indicated under sections 552.104, 552.107, 552.108(a)(1), 552.108(a)(2), and 552.111 of the Government Code. The university must withhold the donors' identifying information you have marked under section 552.1235 of the Government Code. The university must release the remaining responsive information; however, the university may only release any information subject to copyright in accordance with copyright law.

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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 572866

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Richardson Police Department
140 North Greenville Avenue
Richardson, Texas 75081
(w/o enclosures)

Ector County ISD Police Department
802 North Sam Houston
Odessa, Texas 79761
(w/o enclosures)

Duncanville Police Department
201 James Collins Boulevard
Duncanville, Texas 75116
(w/o enclosures)

Brownsville Police Department
ATTN: Records Division
600 East Jackson Street
Brownsville, Texas 78520
(w/o enclosures)

Austin Police Department
715 East 8th Street
Austin, Texas 78701
(w/o enclosures)

Howard County Sheriff's Office
3611 Old State Highway 80
Big Spring, Texas 79720
(w/o enclosures)

Edinburg Police Department
1702 South Closner Boulevard
Edinburg, Texas 78539
(w/o enclosures)

EverFi
3299 K Street N.W., 4th Floor
Washington, D.C. 20007
(w/o enclosures)

LawRoom
1255 Treat Boulevard
Walnut Creek, California 94597
(w/o enclosures)