



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 17, 2004

Ms. Carol Longoria  
Public Information Coordinator  
University of Texas System  
201 West 7<sup>th</sup> Street  
Austin, Texas 78701-2981

OR2004-7973

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209197.

The Office of Public Affairs, Office of General Counsel, Office of Governmental Relations, and Office of Legal Affairs of the University of Texas System (the "system") received several requests for information from Jonathan York of the Daily Texan. The present ruling addresses the requests you have identified as numbers 11, 12, 13, and 17. Each request seeks correspondence pertaining to the Daily Texan that is maintained by the respective system offices at issue. You indicate that the system will release some responsive information to the requestor. You also indicate that the system sought clarification of request number 17, and you have submitted a copy of the requestor's written response. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999)(discussing requests for clarification). You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.106, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exception you claim and reviewed the submitted information.<sup>1</sup>

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<sup>1</sup> With respect to request number 12, directed to the Office of General Counsel, you indicate that you have submitted a representative sample of a portion of the information at issue. We assume that the representative sample is truly representative of the portion of the records at issue. *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.

First, you contend that a portion of the information at issue in request number 11 is excepted from disclosure under section 552.104 of the Government Code.<sup>2</sup> Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded.

You indicate that a portion of the information at issue relates to competitive bidding for a contract with the United States Department of Energy (“DOE”) to manage and operate the Los Alamos National Laboratory. You indicate that the system anticipates submitting a contract proposal to DOE, and you assert that release of the information you seek to withhold under section 552.104 would harm the system’s competitive position with respect to DOE and potential vendor partners. Based on your representation and our review of the information at issue, we find you have demonstrated that disclosure of the information you seek to withhold under section 552.104 at this time would cause specific harm to the system’s interests in a particular competitive bidding situation. We therefore determine the system may withhold this information, which we have marked, pursuant to section 552.104 of the Government Code.

Next, you contend that portions of the requested information are excepted under section 552.107 of the Government Code.<sup>3</sup> Section 552.107(1) of the Government Code excepts from disclosure information protected by 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.<sup>4</sup> TEX. R.

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<sup>2</sup> Specifically, you raise section 552.104 with respect to the documents at Tab 9 in the information responsive to request number 11.

<sup>3</sup> Specifically, you raise section 552.107 with respect to the documents at Tabs 5 through 7 in the information responsive to request number 12, and the documents at Tabs 6 through 9 in the information responsive to request number 17.

<sup>4</sup> The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>5</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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, no writ). 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) of the Government Code 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 that the information you seek to withhold under the attorney-client privilege constitutes or documents communications among system personnel and attorneys made for the purpose of providing professional legal services to the system. You indicate that the communications were intended to be confidential, and that the confidentiality has been maintained. Based on your representations and our review, we find you have established that the information you seek to withhold under section 552.107 is protected by the attorney-client privilege and may be withheld. We have marked the information that the system may withhold pursuant to section 552.107 of the Government Code.<sup>6</sup>

You also contend that the submitted documents include information that is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 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.” In Open Records Decision No. 615

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<sup>5</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

<sup>6</sup> Based on this finding, we do not reach your other claimed exceptions for this information.

(1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. See *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

You state that the information you seek to withhold under section 552.111 consists of internal communications among system personnel pertaining to matters of system policy. Upon review, we agree that the submitted information contains advice, recommendations, opinions, and other material reflecting the policymaking processes of the system. Furthermore, you indicate that a portion of the information at issue consists of preliminary drafts of policy documents. Accordingly, we have marked the information in the submitted documents that is excepted from disclosure under section 552.111 of the Government Code and may be withheld.<sup>7</sup> The remainder of the documents, however, do not consist of advice, recommendations, opinions, or other material reflecting the deliberative or policymaking processes of the system and therefore may not be withheld under section 552.111.

We note, however, that some of the information that is not excepted under section 552.111 is confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student. See 20 U.S.C. § 1232g(b)(1), (d) (for student eighteen years of age or attending institution of postsecondary education, permission or consent required of and rights accorded to parent under FERPA are required of and accorded to student); see also 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA

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<sup>7</sup> Based on this finding, we do not reach your claim under section 552.106 for a portion of this information.

into chapter 552 of the Government Code, and provides that "information contained in education records of an educational agency or institution" is not subject to required public disclosure under chapter 552 except in conformity with FERPA. Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution, or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student. *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked information in the submitted documents that is confidential under FERPA and must be withheld.

Finally, you indicate that some e-mail addresses contained in the submitted documents are excepted under section 552.137 of the Government Code, which provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a), (b). Section 552.137 excepts certain e-mail addresses of members of the public who have not affirmatively consented to the release of the e-mail addresses. Section 552.137(c) provides certain conditions under which e-mail addresses of members of the public are not excepted from disclosure, which are not applicable here. *See* Gov't Code § 552.137(c) (e-mail address provided by contractor or vendor, contained in bid proposal, or on letterhead or document available to public generally not excepted under section 552.137). Further, section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. The system must withhold the marked e-mail addresses in the remaining information, unless it has received affirmative consent to release them.

Finally, you ask this office to issue a previous determination permitting the system to withhold information relating to contract matters with the DOE and the Los Alamos National Laboratory, without the necessity of requesting an attorney general decision. We decline to issue such a previous determination at this time.

In summary, we have marked the information in the submitted documents that the system may withhold pursuant to sections 552.104, 552.107, and 552.111 of the Government Code. We have also marked student identifying information that is confidential under FERPA and must be withheld. The system must withhold the marked e-mail addresses in the remaining

information under section 552.137 of the Government Code, unless it has received affirmative consent to release them. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a stylized flourish at the end.

David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 209197

Enc: Submitted documents

c: Mr. Jonathan York  
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(w/o enclosures)