



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2009

Ms. Neera Chatterjee
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-00052

Dear Ms. Chatterjee:

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# 331267.

The University of Texas at Brownsville and Texas Southmost College (the "university") received a request for all e-mails sent by a particular employee during a particular time period. You state that some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim that a portion of the requested information is not subject to the Act. You also claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.136, and 552.137 of the

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

We first address the university's assertion that the e-mails in Tab 7 are not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a).

You state that the information at issue was not collected, assembled, or maintained in connection with the transaction of any official business of the university. You indicate that the documents at issue are simply an incidental use of e-mail by a university employee and pertain only to personal matters. Based on your arguments and our review of the documents at issue, we agree that the e-mails in Tab 7 do not constitute "public information" that is subject to the Act. See *id.* § 552.021; see also 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). Accordingly, this information need not be released in response to the request.⁴

We now address your exceptions to disclosure of the remaining information. First, you assert that the remaining information is excepted under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note that as the submitted information is not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. See ORD 676 at 4. We also note that section 552.101 does not encompass Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.

³We assume that 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.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has found that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

In this instance, you state, and provide documentation showing, that the requestor is a former university employee who filed a claim of alleged discrimination with the EEOC against the university prior to the date the university received the request for information. Upon review, we determine that the university has established that it reasonably anticipated litigation on the date that it received the request for information. Furthermore, upon review, we conclude that some of the information that you seek to withhold under section 552.103 is related to the anticipated litigation. See ORD 551 at 5 (attorney general will determine whether governmental body has reasonably established that information at issue is related to

litigation). We have marked the information that is subject to section 552.103.⁵ However, the university has failed to demonstrate how the remaining information relates to the anticipated litigation, and it may not be withheld under section 552.103.

We note, however, that once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any requested information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note that to the extent the requestor only had access to the submitted information in the usual scope of his employment with the university, such information is not considered to have been obtained by the opposing party to the litigation and may therefore still be withheld under section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

Next, you assert that the remaining information in Tab 6 is excepted under section 552.107 of the Government Code. Section 552.107(1) 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 Texas 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 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

⁵Because our determination on this issue is dispositive, we need not address your remaining arguments against disclosure of the information at issue.

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, 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) 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 remaining information in Tab 6 consists of communications between university employees and attorneys for the university. You assert that these communications were made in furtherance of the rendition of professional legal services, that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. After reviewing your arguments and the information at issue, we find that the remaining information in Tab 6, which we have marked, constitutes privileged attorney-client communications that the university may withhold under section 552.107.

You assert that the information in Tab 9 is excepted from disclosure under 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.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

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

In this instance, you argue that the information in Tab 9 is subject to section 552.111 because it forms the basis for advice, recommendations, and opinions related to the university's policy regarding ethical violations. However, upon review, we find that the information at issue pertains strictly to an administrative investigation made by the university that does not rise to the level of policymaking. Accordingly, none of the information in Tab 9 may be withheld under section 552.111 of the Government Code.

We note that some of the information in Tab 9 is subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent the employee to whom the information we have marked pertains timely elected confidentiality under section 552.024, the university must withhold the information we have marked in Tab 9 under section 552.117(a)(1) of the Government Code. If the employee did not timely elect confidentiality, the information at issue may not be withheld under section 552.117(a)(1).

We note that some of the information in Tab 9 is subject to section 552.136 of the Government Code. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Accordingly, the university must withhold the

account numbers that we have marked in Tab 9 under section 552.136 of the Government Code.

In summary, the e-mails in Tab 7 are not subject to the Act and need not be released in response to this request. The university may withhold the information we have marked under section 552.103 of the Government Code and the information we have marked in Tab 6 under section 552.107 of the Government Code. The university must withhold the information we have marked in Tab 9 under section 552.117(a)(1) of the Government Code to the extent the employee to whom the information we have marked pertains timely elected confidentiality under section 552.024 of the Government Code. The university must withhold the information we have marked in Tab 9 under section 552.136 of the Government Code. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/eeg

Ref: ID# 331267

Enc. Submitted documents

c: Requestor
(w/o enclosures)