



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

OR2009-07826

Dear Ms. Chaterjee:

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# 345314.

The University of Texas Medical Branch at Galveston ("UTMB") received a request for three categories of information pertaining to Dr. Stanley Lemon's participation on the National Science Advisory Board for Biosecurity (the "NSABB") and e-mails sent to or received by Dr. Lemon containing the words "biosecurity" and "NSABB." You claim that some of the requested information is not subject to the Act. In addition and in the alternative, you claim that the responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code. You state that some of the submitted information may implicate the proprietary interests of the American Society for Microbiology (the "ASM"), the National Academies (the "NA"), the Midwest Research Institute ("Midwest"), and the United States Department of Health and Human Services (the "USDHHS"). You also state, and provide documentation showing, that UTMB notified these interested parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We received correspondence from ASM. We also received comments from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information

at issue in request for attorney general decision should or should not be released). We have considered all of the submitted arguments and have reviewed the submitted information.¹

Section 552.021 of the Government Code provides for public access to "public information," *see id.* § 552.021, which is defined by section 552.002 of the Government Code 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). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

Both UTMB and the ASM argue that portions of the submitted information are not subject to the Act. UTMB asserts that the information contained in Tabs 5A and 5B consists of e-mails that were sent or received by Dr. Lemon in his capacity as a member of the NSABB, a private organization. You state that "when Dr. Lemon participates as member of the NSABB[,] he serves as a citizen and member of his profession, but not as a representative or employee of UTMB." You further state that the communications at issue "are created by and for the NSABB" and are not collected, assembled, or maintained in connection with the transaction of any official business of UTMB. After reviewing your arguments and the information at issue, we agree that the information contained in Tabs 5A and 5B do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for UTMB. *See* Gov't Code § 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). Therefore, we conclude that Tabs 5A and 5B are not subject to the Act and need not be released in response to this request.²

AMS asserts that portions of its information, contained in Tab 5C, are also not subject to the Act. ASM explains it is a private, non-profit organization engaging in educational and scientific activities. ASM also states that Dr. Lemon is a member of ASM and the information at issue "was communicated to Dr. Lemon in his private capacity as a member

¹We 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.

²As we are able to make this determination, we do not address UTMB's arguments against disclosure of this information.

of [ASM] for the sole purposes of providing comments in his private capacity in connection with ASM's development of its private positions." Further, ASM states that the communications at issue were "prepared by private persons for private purposes . . . [and] are not related to any matter related to official business in or within the State of Texas." Upon review of ASM's arguments and the information at issue, we agree that ASM's information in Tab 5C, which we have marked, does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for UTMB. *See* Gov't Code § 552.021; *see also* ORD 635. Therefore, we conclude that the information we have marked in Tab 5C is not subject to the Act and need not be released in response to this request.³

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Midwest, the NA, or the USDHHS. Thus, these parties have not demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act, and UTMB may not withhold any of the remaining information on that basis. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We now address UTMB's arguments against the disclosure of the remaining information in Tab 5C. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 418.177 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.177 provides as follows:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

³As we are able to make this determination, we do not address UTMB's or ASM's arguments against disclosure of this information.

Id. § 418.177. The fact information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

You inform us the information you have marked "outlines recommendations to be used by [UTMB] to build upon security initiatives through its personnel reliability program, which ensures that its employees are reliable and trustworthy, especially as to individuals at UTMB who have access to select agents." You state the marked information "relates to information collected and maintained by the UTMB for the purpose of preventing and detecting a potential act of terrorism or criminal activity and it relates to assessments maintained by UTMB of the risk or vulnerability of UTMB to an act of terrorism or criminal activity." You also state that release of the marked information would "expose a vulnerability the campus may have in relation to the individuals it hires to handle select agents." Upon review of your arguments and the information at issue, we find the information we have marked was collected or maintained by UTMB for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity, and relates to an assessment of the risk or vulnerability of UTMB to an act of terrorism or related criminal activity. *See id.* § 418.177. Therefore, UTMB must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.⁴ However, we also find that you have not adequately demonstrated that any of the remaining information you have marked assesses the risk or vulnerability of persons or property to an act of terrorism or related criminal activity for the purposes of section 418.177. We therefore conclude that UTMB may not withhold any of the remaining marked information under section 552.101 on the basis of section 418.177.

You claim that the information you have marked is excepted from disclosure under section 552.107(1) 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

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

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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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 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 information you have marked consists of communications between a UTMB attorney and UTMB employees, and that these communications were made in furtherance of the rendition of legal services and advice for UTMB. You further state that all of these communications were made in confidence, and that confidentiality has been maintained. You have specifically identified the UTMB attorney and UTMB employees at issue. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the information you have marked may generally be withheld under section 552.107.⁵ However, we note some of the individual e-mails in the submitted e-mail strings were not communications made in furtherance of the rendition of legal services and advice, and, thus, are not privileged. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, you assert that the information you have marked in Tab 5C 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).

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

You state that the information you have marked consists of: (1) draft minutes and a draft agenda relating to the UTMB Community Liaison Committee; and (2) draft reports and communications relating to UTMB's personnel reliability program. You state UTMB will

release the final agendas and minutes to the extent they exist.⁶ You state that the draft reports and communications “contain and/or outline advice and recommendations from UTMB employees regarding the personnel reliability program. . . . and help facilitate the creation of feasible policy decisions with regard to this program.” Based upon your representations and our review, we agree that UTMB may withhold some of the information you have marked under section 552.111. However, we find that the remaining information at issue consists of purely factual information that is not excepted under section 552.111. Accordingly, you may only withhold the information we have marked under section 552.111.⁷

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We note that section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c) of the Government Code. In addition, you state that UTMB has not received consent for the release of the marked e-mail addresses. Therefore, UTMB must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, Tabs 5A, 5B, and the information we have marked in Tab 5C are not subject to the Act and need not be released in response to this request. UTMB must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. With the exception of the marked non-privileged e-mails that exist separate and apart from the submitted e-mail strings, UTMB may withhold the information you have marked under section 552.107 of the Government Code. UTMB may also withhold the information we have marked under section 552.111 of the Government Code. UTMB must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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.

⁶We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 345314

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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