



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 29, 2009

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

OR2009-10481

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# 350462.

The University of Texas Medical Branch at Galveston (the "university") received a request for e-mails sent to or from a named individual over a specified period of time. You state the university is releasing some of the requested information. You claim that a portion of the submitted information is not subject to the Act. You also claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.<sup>1</sup>

Initially, we address your contention that the e-mails you have marked are not public information 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). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the

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<sup>1</sup>We 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.

governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

You assert the e-mails you have marked “were not collected, assembled or maintained in connection with the transaction of any [u]niversity business, nor were they collected, assembled, or maintained pursuant to any law or ordinance.” Upon review, we agree that the e-mails you have marked are purely personal and 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 the university. *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). Thus, we conclude that these e-mails are not subject to the Act, and need not be released in response to this request.<sup>2</sup>

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. Section 552.101 encompasses confidentiality provisions such as section 161.032 of the Health and Safety Code, which provides in relevant part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

...

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . [or] hospital district[.]

Health & Safety Code § 161.032(c), (f). You state that the information you have marked consists of records and reports made and/or received by the university’s Chief Compliance Officer. You also state the information you have marked pertains to various investigations and audits handled by the university’s Office of Institutional Compliance. You inform us these investigations and audits were performed in accordance with the university’s compliance program. You state that these documents are not made or maintained in the regular course of business. *Cf. Texarkana Mem’l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Based on your representations and our review, we conclude that the information you have marked consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must withhold the

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<sup>2</sup>As we are able to make this determination, we need not address your arguments against disclosure of this information.

information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.<sup>3</sup>

Section 552.107(1) of the Government Code protects information that comes 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 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 e-mails you have marked are communications between university attorneys and their clients, and that these communications were made in furtherance of the rendition of legal services and advice for the university. You have identified the university attorneys and clients who are parties to these communications. You further state that all of these communications were made in confidence and have not been shared or distributed to others.

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Based on your representations and our review, we find that you have demonstrated the applicability of the attorney-client privilege to the e-mails you have marked. These e-mails may generally be withheld under section 552.107(1).<sup>4</sup> However, one of the individual e-mails contained in the e-mail strings is a communication with a party you have not identified. Further, you have not otherwise described the relationship this party has with the university. Therefore, we conclude you have failed to establish how this e-mail, which we have marked, constitutes a communication between or among university representatives and attorneys for the purposes of section 552.107. Thus, to the extent that this non-privileged e-mail exists separate and apart from the submitted e-mail chains, it may not be withheld under section 552.107.

Section 552.111 of the Government Code excepts from public 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. The purpose of this exception 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 (1993), 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 only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of a governmental body. *See* Open Records Decision 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 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 a 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* Open Records Decision No. 615 at 5. If, however, the 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 explain that portions of the submitted information pertain to written exchanges and dialogues by the system's staff regarding a job code policy, photo policy for the Galveston National Laboratory, changes to the university's student accident and injury report form, and management of ambiguous job codes. You assert that these communications contain advice and recommendations regarding the items mentioned above. Next, you state that some of the information at issue consists of draft agendas for meetings regarding the Institutional Handbook of Operating Procedures and the Medical Compliance Advisory Committee and drafts of proposed legislation. You indicate the university will release the final versions of the draft documents. Based on these representations and our review, we agree that the draft documents we have marked are excepted from disclosure under section 552.111 and may be withheld on that basis. However, the remaining information consists of general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the remaining information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, we find that this information is not excepted from disclosure under section 552.111, and it may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The university may only withhold information under section 552.117(a)(1) on behalf of current officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their family member information confidential pursuant to section 552.024, the university must withhold this information, which we marked, under section 552.117(a)(1). If the employees at issue did not timely elect under section 552.024, this information must be released. However, no portion of the remaining information that you have marked under section 552.117 constitutes a home address, home telephone number, social security number, or family member information. Accordingly, you may not withhold the remaining information that you have marked under section 552.117.

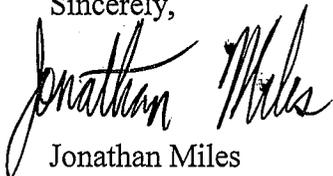
Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. In addition, you state that the university has not received consent for the release of the e-mail addresses at issue. Therefore, the university must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, the information you have marked is not subject to the Act and need not be released in response to this request. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The university may withhold the information you have marked under section 552.107 of the Government Code. However, to the extent the non-privileged e-mail we have marked exists separate and apart from the submitted e-mail chains, it may not be withheld under section 552.107. The university may withhold the information we have marked under section 552.111 of the Government Code. If the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the university must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The university must withhold the e-mail addresses you 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.

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](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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/dls

Ref: ID# 350462

Enc. Submitted documents

c: Requestor  
(w/o enclosures)