



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 9, 2009

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

OR2009-14301

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# 357899 (OGC# 120776).

The University of Texas Health Science Center at Houston (the "university") received a request for: (1) e-mails from a specified person since April 10, 2009; (2) compensation paid to the same person since January 1, 2009; (3) an attachment from a specified e-mail; and (4) a specified letter. You state that the university has released or will release some information responsive to requested item (1) and all information responsive to requested items (2), (3), and (4). You claim that some of the remaining responsive information is not subject to the Act. You also claim that portions of the remaining responsive information are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.<sup>1</sup>

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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.

The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "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 inform us that portions of the submitted information consist of personal e-mails that have no connection with university business and represent incidental use of university e-mail by a university employee. After reviewing the information at issue, we agree that the information you 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 the university. 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). Therefore, this information is not subject to the Act and the university need not release it in response to this request.

We next consider your arguments against disclosure of the remainder of the submitted information. Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law and constitutional rights of privacy.

Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information that attorney general has determined to be private).

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. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. 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.* at 7. The scope of information protected is narrower than that under the common-law

doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we agree that the information concerns matters within a "zone of privacy" protected by the constitution. Consequently, we have marked the identifying information in the records in order to protect the individual's constitutional privacy interest. The remaining information you seek to withhold does not implicate the individual's constitutional or common law right to privacy. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy, but may not withhold any of the remaining information on the basis of section 552.101 in conjunction with common-law or constitutional privacy.

Section 552.101 also encompasses information made confidential by other statutes. Section 51.914 of the Education Code provides in relevant part:

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In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee;

(3) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility that is jointly financed by the federal government and a local government or state agency, including an institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state.

Educ. Code § 51.914(1), (3). The legislature is silent as to how this office or a court is to determine whether particular information has "a potential for being sold, traded, or licensed for a fee." *See* Open Records Decision No. 651 (1997). Furthermore, whether particular information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* Thus, this office has stated that in considering whether

requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has this potential. *See id.*; *but see id.* at 10 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We also note that section 51.194(1) is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988). Moreover, section 51.914(1) is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code § 51.914(1).

You inform us that the information you have marked under section 51.914(1) includes unpublished research developed by the university that has the potential for being sold, traded, or licensed for a fee. You contend that disclosure of this information would directly reveal the substance of the research and permit third parties to appropriate such research. Based on your representations, we conclude that the portions of the submitted information that we have marked under section 51.914 are confidential under this section. As such, the university must withhold this information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. However, you have not established that any of the remaining submitted information reveals the substance of the research at issue; thus, none of the remaining submitted information is confidential under section 51.914.

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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 under section 552.107 are communications between and among university attorneys and other university employees, all of whom you have identified. You state that these communications were made in furtherance of the rendition of legal services to the university, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the information you have marked under section 552.107 constitutes privileged attorney-client communications. Accordingly, the university may withhold these communications under section 552.107 of the Government Code.

Section 552.111 of the Government Code 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, recommendations, and opinions 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, and opinions that reflect 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. 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 the governmental body's policy mission. *See Open Records Decision No. 631 at 3 (1995)*. Moreover, 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)*.

We agree that the information we have marked consists of advice, recommendations, and opinions that reflect the policymaking processes of the university, but conclude that none of the remaining information at issue consists of such advice, recommendations, and opinions. Accordingly, the university may withhold the information we have marked under section 552.111 of the Government Code, but may not withhold any of the remaining information at issue under this exception.

We note that section 552.117(a)(1) of the Government Code excepts from 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 the information be kept confidential under section 552.024 of the Government Code.<sup>2</sup> 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 be withheld under section 552.117(a)(1) only 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. Therefore, the university must withhold the information we have marked under section 552.117(a)(1) to the extent the employee concerned timely elected under section 552.024 to keep her personal information confidential.

Finally, we note that section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). Therefore, the university must withhold the access device number we have marked pursuant to section 552.136 of the Government Code.

In summary: (1) we have marked information that is not subject to the Act, and the university need not release this information in response to this request; (2) the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy; (3) the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code; (4) the university may withhold the information you have marked under section 552.107 of the Government Code; (5) the university may withhold the information we have marked under section 552.111 of the Government Code; (6) the university must withhold the information we have marked under section 552.117(a)(1) to the extent the employee concerned timely elected under section 552.024 to keep her personal information confidential; (7) the university must

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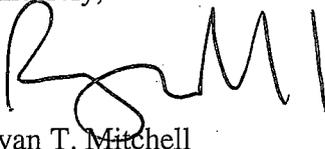
<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the access device number we have marked pursuant to section 552.136 of the Government Code; and (8) the university must release the remainder of the submitted information to the requestor.

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,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/rl

Ref: ID# 357899

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)