



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 3, 2009

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

OR2009-17101

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# 363120.

The University of Texas Health Science Center at Houston (the "university") received a request for e-mails sent from four named university employees during a specified time period. You state that 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 the submitted information is 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 information.<sup>1</sup>

Initially, we note the requestor excluded from his request e-mail attachments, personal e-mail addresses, family member information, access numbers and passwords, information subject to the Family Educational Rights and Privacy Act, section 1232g of title 20 of the United States Code, personal cellular telephone numbers, and the name of any individual donor.

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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.

Therefore, this information is not responsive to the present request. The university need not release nonresponsive information in response to this request, and this ruling will not address that information.

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 university employees. 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, the information you have marked 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 remaining responsive information. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. Section 51.914 of the Education Code provides in relevant part:

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 and our review, we conclude that the portions of the submitted information we have marked are confidential under section 51.914. 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 responsive information reveals the substance of the research at issue; thus, none of the remaining responsive information is confidential under section 51.914.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. 540 S.W.2d at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary,

choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure).

Upon review, we find that portions of the submitted information are highly intimate or embarrassing and of no legitimate public interest. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that none of the remaining responsive information implicates an individual's privacy interests for purposes of common-law privacy. Thus, no portion of the remaining responsive information may be withheld on the basis of common-law privacy.

You claim that some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with constitutional privacy. Constitutional privacy under section 552.101 protects two kinds of interests: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of a personal matter. *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 is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find that none of the remaining responsive information implicates an individual's privacy interests for purposes of constitutional privacy. Thus, no portion of the remaining responsive information may be withheld on the basis of constitutional privacy.

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 pet.). 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, 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 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) (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). 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 also have 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.

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 responsive 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 responsive information under this exception.

In summary, (1) the information you have marked as falling outside the definition of public information is not subject to the Act, and the university need not release it 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 section 51.914 of the Education Code; (3) the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the university may withhold the information you have marked under section 552.107(1) of the

Government Code; and (5) the university may withhold the information we have marked under section 552.111 of the Government Code. The remaining responsive information must be released 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, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

Ref: ID# 363120

Enc. Submitted documents

c: Requestor  
(w/o enclosures)