



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2010

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

OR2010-12702

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# 391317 (OGC# 130812 and 130814).

The University of Texas at Austin (the "university") received two requests from different requestors for (1) all e-mails and other correspondence between the university's president and fifteen named individuals from January 1, 2009 to June 7, 2010 and (2) documents and correspondence from the offices of the university's president and athletic director regarding membership in the Big 12 Conference, Inc. (the "Big 12") and discussions of potential membership in other athletics conferences from January 1, 2010, to June 7, 2010. You claim some of the requested information is not subject to the Act. Alternatively and additionally, you claim the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of some of the requested information may implicate the proprietary interests of the Big 12. Thus, pursuant to section 552.305 of the Government Code, you notified the Big 12 of the requests and of its right to submit arguments to this office as to why the information at issue should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments from an attorney representing the Big 12. We have also received and considered comments from the attorney of one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information

should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note you have marked portions of the submitted information as being non-responsive to the requests for information because they were created after the date the university received the requests for information. Thus, this information is not responsive to the requests. This decision does not address the public availability of the non-responsive information, and that information need not be released. We also note you have marked an e-mail message in one of the submitted e-mail strings as being non-responsive because the message was not sent to or from the university's president. However, because this information is part of the responsive e-mail string and generally referenced in the responsive communications, it is responsive to the request for information. Accordingly, we will consider your arguments against disclosure for this information, as well as the arguments against disclosure submitted for the remaining information.

Next, the Big 12 seeks to withhold e-mail communications the university has not submitted for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because the e-mail communications at issue were not submitted by the university, this ruling does not address the Big 12's arguments against disclosure of that information.

Both the university and the Big 12 argue some of the requested information is not subject to the Act. The attorney representing one of the requestors asserts all of the requested information is subject to the Act. 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).

You assert the information you have marked consists of information relating to the participation of the university's president as Chair of the Board of Directors of the Big 12 (the "board"). You state the information at issue "was prepared by or for the members of the [board and] was given to President Powers in his capacity as Chair of [the board,] and not

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

in performance of his duties as president of the [u]niversity.” You further state the communications at issue were not collected, assembled, or maintained in connection with the transaction of any official business of the university. After reviewing the submitted arguments and the information at issue, we agree 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* 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 the marked information is not subject to the Act and need not be released in response to these requests.²

The Big 12 contends some of the remaining information is also not subject to the Act because the information was generated by the Big 12, which is not a governmental body. We note, however, the information at issue was sent to the university’s athletic director and other university officials, and is in the possession of the university. Furthermore, this information was collected, assembled, or maintained in connection with the transaction of the university’s official business, and the university has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and must be released, unless the university or the Big 12 demonstrate the information falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

The university claims some of the remaining information is protected by the attorney-client privilege. 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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

²As we are able to make this determination for this information, we need not address the university’s arguments under sections 552.107 and 552.111 of the Government Code or the Big 12’s arguments under sections 552.110 and 552.131 of the Government Code for this information.

between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A)-(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. See *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 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 assert the marked e-mails and notes consist of communications between attorneys for and employees and officials of the university. You indicate the communications were made in connection with the rendition of professional legal services for the university. You have identified the parties to the communications. You state the communications were not intended to be, and have not been, disclosed to third parties. Based on your representations and our review, we conclude the marked information is privileged attorney-client communications and may generally be withheld under section 552.107 of the Government Code.³ However, we note one of the submitted e-mail strings includes a communication with a non-privileged party, which is separately responsive to the instant request. If the communication with this non-privileged party, which we have marked, exists separate and apart from the e-mail string in which it appears, then the university may not withhold the communication with the non-privileged party under section 552.107(1).

You claim the remaining e-mails and attachments are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. 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.*

³As our ruling is dispositive, we need not address the university’s remaining argument against disclosure for this information.

Gilbreath, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting 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. 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You argue the remaining information pertains to internal deliberations between university employees and university attorneys who were assisting the university with athletic conference issues. However, as you acknowledge, some of the information at issue was communicated between representatives of the university, the Big 12, and the other Big 12 member universities, while the remaining information was communicated between a university attorney and a representative of an athletic conference other than the Big 12. You have not provided any arguments explaining the relationship between the university and the representative of the other athletic conference. Thus, you have not demonstrated how the university shares a privity of interest or common deliberative process with this individual or the institution he represents. Consequently, the e-mails between the university and the other athletic conference are not excepted under the deliberative process privilege and may not be withheld under section 552.111 of the Government Code. You generally assert the representatives of the university, the Big 12, and the other Big 12 member universities share a common deliberative process, as well as a privity of interest, with regard to the information at issue. You have not, however, explained how the representatives of the Big 12 or the other member universities, in this instance, are involved in the university's policymaking process or have policymaking authority regarding university matters. Therefore, we find you have failed to demonstrate how the university shares a privity of interest or common

deliberative process with these individuals with respect to the information at issue. Consequently, the remaining information is not excepted under the deliberative process privilege and may not be withheld under section 552.111 of the Government Code.

The university states it will withhold certain e-mail addresses it has marked in the remaining information under section 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).⁴ Section 552.137 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). We have marked additional e-mail addresses in the remaining information that are not specifically excluded by section 552.137(c). As such, these e-mail addresses must also be withheld under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

The remaining information includes a university employee's cellular telephone number that may be protected under section 552.117 of the Government Code.⁵ Section 552.117(a)(1) excepts from disclosure the current 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 request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) 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 or former 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.

We have marked a university employee's cellular telephone number in the remaining information. You have not informed us whether or not the employee timely chose to not allow public access to her personal information. Furthermore, you have not informed us

⁴The previous determination issued in ORD 684 authorizes all governmental bodies to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁵The 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).

whether or not she paid for her cellular telephone service. Therefore, to the extent the employee timely requested confidentiality for her personal information and the cellular telephone number we have marked is the employee's personal cellular telephone number, the university must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. To the extent the employee did not timely request confidentiality or the marked cellular telephone number is not a personal cellular telephone number, the marked information may not be withheld under section 552.117(a)(1) 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 these requests. The university may withhold the marked information under section 552.107(1) of the Government Code. However, if the non-privileged communication we have marked exists separate and apart from the e-mail string in which it appears, then the university may not withhold this marked communication under section 552.107(1). The university must withhold the e-mail addresses you have marked and the e-mail addresses we have marked under section 552.137 of the Government Code. To the extent the employee whose cellular telephone number we have marked timely requested confidentiality for her personal information and the marked cellular telephone number is the employee's personal cellular telephone number, the university must withhold the marked number pursuant to section 552.117(a)(1) of the Government Code. The remaining responsive 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, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/dls

Ref: ID# 391317

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Ms. Lauren E. Tucker McCubbin
Polsinelli Shughart, P.C.
For The Big 12 Conference, Inc.
120 West 12th Street, Suite 12
Kansas City, Missouri 64105
(w/o enclosures)