



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

OR2010-12706

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# 391128 (OGC# 130810).

The University of Texas at Austin (the "university") received a request for all correspondence sent to or from the university's athletic director's office during a specified time period that pertains to the university's athletics, membership in the Big 12 Conference (the "Big 12"), or a possible move to another conference. You state the university will withhold the e-mail addresses you have marked in the submitted information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim that the submitted 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 Conference, Inc. (the "Big 12"). Thus, pursuant to section 552.305 of the Government Code, you notified the Big 12 of the request 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 the

---

<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them 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.

Big 12. We have considered the exceptions claimed and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note you have marked one of the submitted e-mails as non-responsive. However, because this marked e-mail is attached to a responsive e-mail and generally referenced in the responsive e-mail, it is responsive to the request for information. Accordingly, we will consider your arguments against disclosure for this information, as well as for the remaining information.

Next, the Big 12 argues some of the submitted e-mails are not subject to the Act. 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). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Big 12 argues that some of the submitted e-mails are not subject to the Act because they were generated by the Big 12, and the Big 12 itself is not a governmental body. However, we note the e-mails at issue were sent to the university's athletic director and are in the possession of the university, which is a governmental body as defined by section 552.003. Additionally, these e-mails were collected, assembled, or maintained in connection with the transaction of the university's official business. Therefore, we conclude that the e-mails at issue are subject to the Act and must be released, unless the university or the Big 12 demonstrate that the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.<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. *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

---

<sup>2</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.

<sup>3</sup>Although the Big 12 also presents arguments under sections 552.110 and 552.131 of the Government Code, based on the Big 12's markings, we understand these arguments to apply only to documents responsive to ID# 391130. Therefore, we do not address the Big 12's arguments under section 552.110 or section 552.131.

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 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 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 assert the information you have marked consists of communications between attorneys for and employees of the university. You indicate these 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 information you have marked constitutes privileged attorney-client communications that may be withheld under section 552.107(1) of the Government Code.<sup>4</sup>

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

---

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

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 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. However, 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).

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. 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 remaining information. 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.

In summary, the university may withhold the information you have marked under section 552.107 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, toll free, at (888) 672-6787.

Sincerely,



James McGuire  
Assistant Attorney General  
Open Records Division

JM/dls

Ref: ID# 391128

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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