



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 24, 2010

Mr. R. Brooks Moore  
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OR2010-12894

Dear Mr. Moore:

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# 391475 (TAMU Request Nos. 10-284, 10-288, and 10-290).

Texas A&M University (the "university") received requests from three requestors for (1) communications during a specified time interval between the university president and sixteen named individuals during a specified time interval; (2) documents and correspondence during a specified time interval from the offices of the university president and the athletics director regarding membership in the Big 12 Conference (the "Big 12") and discussion of potential membership in other athletics conferences; and (3) communications during a specified time interval regarding university athletics, the Big 12, and a possible move to another conference. You claim that some of the requested information is excepted from disclosure under sections 552.107, 552.111, and 552.1235 of the Government Code. You also believe that some of the requested information may implicate the interests of the Big 12. You inform us that the Big 12 was notified of these requests for information and of its right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> We received correspondence from an attorney for the Big 12. We also received

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

comments from an attorney for one of the requestors.<sup>2</sup> We have considered all of the submitted arguments and reviewed the submitted information.<sup>3</sup>

We first note that some of the information submitted as Exhibits B-3 and B-4 was encompassed by a previous request for information, as a result of which the university requested our ruling in Open Records Letter No. 2010-12031 (2010). In requesting the previous ruling, the university did not claim an exception for the information in Exhibit B-3 that was encompassed by the previous request and did not submit to our office the information in Exhibit B-4 that was encompassed by the previous request. The university and the Big 12 now seek to withhold some of this same information under sections 552.104 and 552.111 of the Government Code. We note that the Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Sections 552.104 and 552.111, which the university and the Big 12 now claim, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 could be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 could be waived). As such, sections 552.104 and 552.111 neither prohibit public disclosure of information nor make information confidential under law. Therefore, the information in Exhibits B-3 and B-4 that is encompassed by the previous request may not now be withheld under section 552.104 or section 552.111. We note, however, that the Big 12 also claims sections 552.110, 552.131, and 552.137 of the Government Code. Because those exceptions are confidentiality provisions for purposes of section 552.007, we will consider the Big 12's claims under sections 552.110, 552.131(a), and 552.137 for the information in Exhibit B-4, along with its claim that the information is not subject to disclosure under the Act. We also will consider the university's and Big 12's arguments against disclosure of the remaining information at issue.

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<sup>2</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

<sup>3</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We begin with the university's claims under sections 552.107, 552.111, and 552.1235 of the Government Code. Section 552.107(1) 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 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. *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).

We understand the university to claim section 552.107(1) for the highlighted information in Exhibit B-1. The university states that this information consists of communications between attorneys for and representatives of the university that were made for the purpose of facilitating the rendition of professional legal services to the university. The university has identified the parties to the communications. The university also states that the communications were intended to be and remain confidential. Based on the university's representations and our review of the information at issue, we conclude that the highlighted information in Exhibit B-1 may be withheld under section 552.107(1) 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, 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. 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).

This office also has 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 note that section 552.111 can encompass a governmental body’s communications with a third party with which the governmental body shares a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). In order 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 governmental body’s communication with a third party unless the governmental body demonstrates that it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

The university claims section 552.111 for the remaining information in Exhibit B-3. The university states that the information in question includes intra-agency communications and preliminary drafts of documents intended for public release in their final form. Having considered the university's representations and reviewed the information at issue, we have marked advice, opinion, and recommendations relating to matters of university policy that may be withheld under section 552.111 of the Government Code. We find that the university has not demonstrated that any of the remaining information in Exhibit B-3 either constitutes a draft of a policymaking document or otherwise falls within the scope of section 552.111. *See* ORD 561 at 9. We therefore conclude that the university may not withhold any of the remaining information in Exhibit B-3 under this exception.

The university also raises section 552.1235 of the Government Code, which excepts from disclosure "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). For the purposes of this exception, "institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an "institution of higher education" as meaning "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See* Gov't Code § 311.005. "Person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). We note that the amount or value of an individual gift, grant, or donation is not excepted from disclosure under section 552.1235. *See id.* § 552.1235(b). The university states that the marked information in Exhibit B-2 identifies a private donor to an institution of higher education. Based on the university's representation, we conclude that the marked information must be withheld under section 552.1235.

Next, we consider the Big 12's arguments with regard to the information in Exhibit B-4. We understand the Big 12 to contend that some of the information in question is not subject to disclosure under 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). We understand the Big 12 to contend that its communications with the members of the Big 12's board of directors, in their capacities as members of the board, were not collected, assembled, or maintained in connection with the transaction of any official business of the university. Having considered the Big 12's arguments and reviewed the information at issue,

we find that the information we have marked was not “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. Gov’t Code § 552.002; *see* 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). We therefore conclude that the marked information is not subject to the Act and need not be released in response to the instant requests for information.<sup>4</sup>

We also understand the Big 12 to contend that other information in Exhibit B-4 is not subject to the Act because the information was generated by the Big 12, which is not a governmental body subject to the Act. *See* Gov’t Code § 552.003(1)(A) (defining “governmental body”). We note, however, that the information at issue was sent to the university’s athletic director and is in the university’s possession. Moreover, the university has submitted this information as being subject to the Act. We find that the university collected, assembled, or maintains this information in connection with the transaction of its official business. We therefore conclude that the remaining information in Exhibit B-4 is subject to the Act and must be released, unless the Big 12 demonstrates that the information falls within an exception to disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

We next note that the Big 12 claims sections 552.104, 552.110, 552.111, 552.131, and 552.137 of the Government Code for much of the remaining information in Exhibit B-4. As previously explained, sections 552.104 and 552.111 are discretionary exceptions that protect a governmental body’s interests and may be waived. *See id.* § 552.007; ORD 592, 470. Likewise, section 552.131(b) of the Government Code is a discretionary exception that protects a governmental body’s interests and may be waived.<sup>5</sup> Therefore, because the university does not claim section 552.104, section 552.111, or section 552.131(b) for any of the remaining information in Exhibit B-4, none of the information at issue may be withheld under any of those exceptions. However, sections 552.110, 552.131(a), and 552.137, which the Big 12 also claims, protect the interests of third parties. Therefore, we will determine whether any of the remaining information in Exhibit B-4 must be withheld under sections 552.110, 552.131(a), or 552.137.

Section 552.110 of the Government Code protects a third party’s proprietary interests with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(a)-(b). Section 552.110(b) requires a specific factual or evidentiary

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<sup>4</sup>As we are able to make this determination, we need not address the Big 12’s other arguments against disclosure of the marked information.

<sup>5</sup>Section 552.131(b) provides that “[u]nless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].” Gov’t Code § 552.131(b).

showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999).

We understand the Big 12 to claim that section 552.110(b) is applicable to some of the remaining information in Exhibit B-4. Having considered its arguments, we find that the Big 12 has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause the Big 12 substantial competitive harm. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We therefore conclude that the university may not withhold any of the remaining information in Exhibit B-4 under section 552.110 of the Government Code.

Section 552.131(a) of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORD 552, 661. The Big 12 does not contend, and thus has not demonstrated, that any of the remaining information in Exhibit B-4 constitutes a trade secret under section 552.110(a). As previously concluded, the Big 12 has not demonstrated that section 552.110(b) is applicable to any of the remaining information in Exhibit B-4. We therefore conclude that the university may not withhold any of the remaining information in Exhibit B-4 under section 552.131(a) of the Government Code.

Lastly, section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the

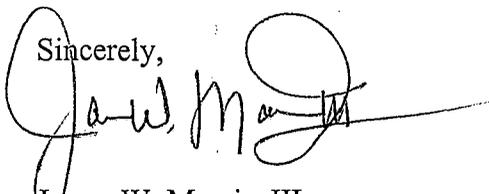
e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). We note that section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses of members of the public in Exhibit B-4 that the university must withhold under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.<sup>6</sup>

In summary: (1) the information the university has highlighted in Exhibit B-1 may be withheld under section 552.107(1) of the Government Code; (2) the information we have marked in Exhibit B-3 may be withheld under section 552.111 of the Government Code; (3) the information the university has marked in Exhibit B-2 must be withheld under section 552.1235 of the Government Code; (4) the information we have marked in Exhibit B-4 is not subject to the Act and need not be released in response to the instant requests for information; and (5) the e-mail addresses we have marked in Exhibit B-4 must be withheld under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The rest of the submitted 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 W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

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<sup>6</sup>We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

Ref: ID# 391475

Enc: Submitted documents

c: Requestors  
(w/o enclosures)

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