



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2010

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

OR2010-13037

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# 392680 (OGC # 130844).

The University of Texas System (the "system") received a request for: 1) transcripts and meeting notes from meetings held by the Board of Regents (the "BOR") for the University of Texas at Austin (the "university") since May 1, 2010 discussing conference realignment; and 2) correspondence with any BOR member, the university president, or the university athletic director containing information pertinent to conference realignment, the Big 12, university athletic revenue sources, or university athletics conference affiliations or dealings since May 1, 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 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 an attorney representing the Big 12. We have also received and considered comments from the requestor. *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

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.

Initially, we note you have marked some of the submitted e-mails as non-responsive. Because this information is attached to the responsive e-mails 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 for the remaining information.

Both the system and the Big 12 argue some of the requested information is not 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 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 system. 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 system. *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 this request.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 system employees and officials, and is in the possession of the system. Furthermore, this information was collected, assembled, or maintained in connection with the transaction of the system's official business, and the system 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 system or the

²As we are able to make this determination, we need not address the system's or the Big 12's remaining arguments against disclosure for this information.

Big 12 demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

The system 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 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 are communications between attorneys for and employees or officials of the system or the university, its component institution. You indicate these communications were made in connection with the rendition of professional legal services for the system or 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 non-privileged parties, which is separately responsive to the instant request. If the communication with these non-privileged parties, which we have marked, exists separate and apart from the e-mail string in which it appears, then the system may not withhold the communication with the non-privileged parties 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. 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

³As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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 system and university employees and attorneys who were assisting the system and the university with athletic conference issues. Upon review of your arguments and the information at issue, we find the deliberative process privilege is applicable to a portion of the information at issue, which we have marked. However, as you acknowledge, most of the remaining information at issue was communicated between representatives of the system, the Big 12, and the other Big 12 member universities. You generally assert the representatives of the system, 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 system's policymaking process or have policymaking authority regarding system matters. Therefore, we find you have failed to demonstrate how the system 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 system 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).

We now turn to the Big 12's arguments. The Big 12 raises section 552.110(b) of the Government Code. Section 552.110(b) protects "[c]ommercial 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.* § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 (1999). Upon review of the Big 12's arguments, we find it has not made the specific factual

⁴The previous determination issued in Open Records Decision No. 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.

or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause substantial competitive harm. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). We therefore conclude the system may not withhold any of the remaining information under section 552.110(b).

The Big 12 also raises section 552.131 of the Government Code, which provides:

(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.

(b) Unless 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. 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.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Therefore, because we have already determined section 552.110 of the Government Code is not applicable to any of the remaining information at issue, the system may not withhold any information under section 552.131(a) of the Government Code. We further note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the system does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of remaining information is excepted under section 552.131(b) of the Government Code.

In summary, the information the system has marked is not subject to the Act and need not be released in response to this request. The system 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 system may not withhold this communication under section 552.107(1).

The system may withhold the information we have marked under section 552.111 of the Government Code. The system 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, unless the owners of the addresses have affirmatively consented to their release. 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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 392680

Enc. Submitted documents

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(w/o enclosures)

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