ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2010

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

OR2010-13633

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#392985 (OGC #131077).

The University of Texas at Austin (the "university") received a request for all written correspondence including e-mails, faxes, phone notes, and other documents to and/or from the university athletic director, business/finance directors, president, chancellor, head football coach, and head basketball coach regarding membership realignment of the Big 12, Big Ten, or Pac 10 conferences from May 1, 2010 to the date of the request. 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 the Big 12, the requestor, and a law firm representing the requestor. *See* Gov't Code § 552.304 (interested party may submit written

comments regarding availability of requested information). We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

Initially, we note you have marked attachments to 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.

Next, the Big 12 seeks to withhold communications the university has not submitted for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Both the university 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 university business. After reviewing your 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

[1]We 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.

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 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.

Next, we address the requestor's assertion that the university failed to comply with the procedural requirements of section 552.301(b) of the Government Code. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). The requestor argues that the university "did not state the exceptions to disclosure that it believes are applicable" within the ten-business-day deadline. In this instance, the university timely requested a ruling from our office on July 6, 2010 and stated in its brief that the requested information is excepted from disclosure under sections 552.101 through 552.148 of the Government Code. We note the university's brief contains a notation that the requestor was copied on the brief on that date. Accordingly, we find the university met its procedural obligations under section 552.301(b). Therefore, we will address the university's arguments against disclosure of the remaining information.

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

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

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 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 generally conclude the marked information is privileged attorney-client communications and may be withheld under section 552.107(1) of the Government Code. 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.*

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).[3] 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.[4] 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 the university employee's cellular telephone number in the remaining information. You have not informed us whether the employee timely chose to restrict public access to her personal information. Furthermore, you have not informed us whether she paid

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[3]The 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.

[4]The 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).

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 the university has marked is not subject to the Act and need not be released in response to this request. The university may generally withhold the marked information under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mail we have marked in the submitted e-mail chain exists separate and apart from the otherwise privileged e-mail chain in which it is submitted, it must be released. In addition to the e-mail addresses you have marked, the university must withhold 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 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,

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID#392985

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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