ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2010

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-16595

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 requests were assigned ID#s 398910 and 401794. We have combined these files and will consider the issues presented in this single ruling assigned ID# 398910 (OGC # 132467).

The University of Texas at Austin (the "university") received a request for (a) correspondence involving university professors and British Petroleum ("BP") or an agent for BP containing (1) discussion of the Deepwater Horizon oil disaster, (2) scientific or academic research on the Gulf of Mexico, or (3) proposed or finalized contracts between any BP entity and any university professor; and (b) conflict-of-interest or outside income disclosures for any university professor regarding financial or research contracts or legal retainers signed with any BP entity or agent for BP. You state the university has no information responsive to part (b) of the request.[1] You contend some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.136, and 552.137 of the Government Code. Although you take no position on the public availability of the rest of the submitted information, you believe the remaining information may implicate the proprietary

[1]We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

interests of BP. You inform us BP was notified of the instant request for information and of its right to submit arguments to this office as to why the requested information should not be released.[2] We have considered your arguments and reviewed the information you submitted.[3]

We begin with your claim that some of the submitted information is not subject to disclosure under the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) 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 the information in a governmental body's physical possession constitutes public information and is therefore subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You contend the submitted information responsive to part (a)(1) of the request is not subject to the Act.[4] You explain some of the information responsive to part (a)(1) pertains to a university professor's work as an informal advisor to a Science Team formed by the United States Department of Energy (the "DOE") regarding the BP Macondo Well leak. You explain the remaining information responsive to part (a)(1) pertains to BP's invitation to a university professor to assist with the Macondo Well. You inform us the professors' relationships with the DOE

---

[2]*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).

[3]This letter ruling assumes 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).

[4]We note you have marked a portion of one of the documents that are otherwise responsive to part (a)(1). You indicate the marked information is not responsive to the request. This decision does not address the public availability of the marked information, and the university need not release that information in response to this request.

and BP are consistent with University of Texas System policy. You inform us the information responsive to part (a)(1) was prepared by or for either the DOE Science Team or BP. You state the information in question was not prepared by or for the university or any other governmental body subject to the Act. You contend this information was not collected or assembled and is not maintained by or for the university or pursuant to any law or ordinance. Based on your representations, we find the information responsive to part (a)(1) of the request does not constitute "public information," as defined by section 552.002 of the Government Code. Therefore, the information responsive to part (a)(1) is not subject to disclosure under the Act and need not be released to the requestor.[5]

Next, we must determine whether the university complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Under section 552.301(b), a governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Under section 552.301(e), the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information at issue; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish the date; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Pursuant to section 552.302 of the Government Code, if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us the university received the instant request for information on August 16, 2010. You explain the university determined in good faith, on receipt of the request, that it was necessary to seek clarification of parts (a)(2), (a)(3), and (b) of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state, and have provided documentation demonstrating, that a written request for clarification of those parts of the request was sent to the requestor on August 24. You state the university received clarification on September 13. Based on your representations and documentation, we consider the university's ten- and fifteen-business-day periods under section 552.301 for

[5]As we are able to make this determination, we need not address your other claims for this information.

requesting a decision for the clarified portions of the request to have begun on September 13, the date of the university's receipt of the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Therefore, we consider the university to have timely submitted its request for this decision and subsequent correspondence with this office, which we received on September 27 and October 4.[6] Accordingly, we will address your exceptions to disclosure of the remaining information at issue.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential, including section 51.914 of the Education Code, which provides in part:

> In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:
>
> > (1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]
> >
> > (2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

---

[6]We note the university also timely complied with section 552.301 in requesting a ruling on the rest of the submitted information.

Educ. Code § 51.914(1)-(2). As we noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has "a potential for being sold, traded, or licensed for a fee." Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* Thus, this office has stated that in considering whether requested information has "a potential for being sold, traded, or licensed for a fee," we will rely on a university's assertion that the information has this potential. *See id.; but see id.* at 10 (university's determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.194 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988).

You have marked information the university contends is confidential under section 51.914. You explain the marked information pertains to research projects conducted by university researchers and professors. You state this information documents proposed and unpublished research authored or co-authored by university faculty members and contains scientific and other information relating to a product, device, or process (or the application of such) developed by university researchers. You represent to this office the information in question has the potential for being sold, traded, or licensed for a fee. You state release of this information would directly reveal the substance of the research and enable third parties to appropriate it. Based on your representations and our review of the information at issue, we conclude the information we have marked is confidential under section 51.914(1) of the Education Code. Thus, the university must withhold the marked information on that basis under section 552.101 of the Government Code. We conclude you have not demonstrated the rest of the information at issue falls within the scope of section 51.914(1) or is subject to section 51.914(2). Therefore, the university may not withhold any of the remaining information under section 552.101 in conjunction with section 51.914.

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 (1993), 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, and opinions that reflect 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 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.

You claim section 552.111 for some of the remaining information. You state some of the information in question includes communications among university employees regarding research projects. You contend this information is "inherently advice, recommendations, and opinion." You state the information in question also includes drafts of contracts intended for public release in their final form. Having considered your arguments and reviewed the information in question, we find the information pertains to the preparation of a contract and other administrative matters relating to research projects. You have not established, nor is it otherwise clear to this office, that these are administrative matters of broad scope that affect the university's policy mission. *See* ORD 631 at 3. We therefore conclude the university may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). For purposes of section 552.136(b), "access device" means

> a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of

> account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value; or
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

Id. § 552.136(a). You contend section 552.136 is applicable to the "paykeys" you have marked in the remaining information at issue. You state these "paykeys" are codes the university uses to seek reimbursement from BP for travel and other expenses relating to services rendered in connection with a particular contract. You state the "paykeys" could be used to access an account and submit false claims for reimbursement. Based on your representations and our review of the information at issue, we conclude the university must withhold the marked "paykeys" under section 552.136 of the Government Code.

Lastly, we note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from BP. Thus, as BP has not demonstrated any of the remaining information at issue is proprietary for the purposes of the Act, the university may not withhold any of the remaining information on the basis of any proprietary interest BP may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

In summary: (1) the information responsive to part (a)(1) of the request does not constitute "public information," as defined by section 552.002 of the Government Code, and need not be released to the requestor; (2) the information we have marked under section 51.914 of the Education Code must be withheld under section 552.101 of the Government Code; and (3) the "paykeys" you have marked must be withheld under section 552.136 of the Government Code. 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, 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

Ref: ID# 398910

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Kemper Howe
Ms. Veroneeca Cushing
BP America Production Company
501 Westlake Park Boulevard
Houston, Texas 77079
(w/o enclosures)

Ms. Linda M. Curran
BP Corporation North America, Inc.
150 West Warrenville Road Building 603-3E
Naperville, Illinois 60563
(w/o enclosures)

Mr. Mark D. Crombie
BP Alternative Energy International Ltd.
Chertsey Road
Sunbury on Thames
Middlesex TWI6 7LN UK
(w/o enclosures)