



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2011

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

OR2011-06712

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# 417478 (OGC# 135476).

The University of Texas System (the "university") received a request for all voicemails and sent and received e-mails of three named persons from January 31, 2011 to February 2, 2011 regarding the university. You state the university has no responsive information as to one of the named persons. You state some information will be released to the requestor. You further state the university will redact personal e-mail addresses as permitted by Open Records Decision No. 684 (2009).¹ You claim portions of the requested information are not public information subject to disclosure under the Act. You claim the remaining requested information is excepted from disclosure under sections 552.106, 552.107, 552.108, 552.111, 552.116, and 552.136 of the Government Code. You also believe release of the information at issue may implicate the interests of third parties. Accordingly, you submit documentation showing you have notified the Texas State Auditor's Office and M.D. Anderson Cancer Center of the request and their right to submit arguments as to why the requested information should not be released.² See Gov't Code § 552.304 (interested party may submit comments

¹Open Records Decision No. 684 (2009) 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.

²As of the date of this ruling, we have not received arguments from either of the interested third parties.

stating why information should or should not be released). We have considered your arguments and reviewed the submitted representative sample of information.³

We first address your argument that a portion of the requested information is not public information subject to the Act. The Act applies to "public information," 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; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1). You have marked e-mails you contend are not public information subject to the Act. You state a portion of these e-mails relate to a university official's service on the Board of Trustees (the "Board") of an organization unrelated to the university. You state the official serves on the Board "as a member of his profession and as a citizen," but not in his role as an employee of the university. Thus, you argue these communications were "created by and for" the Board, and were not "collected, assembled, or maintained" by or for the university. You state the remaining marked e-mails are personal in nature. You argue these two types of e-mails have no connection to university business and represent permitted incidental use of the university's e-mail system. Upon review, we agree this information 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). Thus, these e-mails do not constitute public information as defined by section 552.002 and the university is not required to release them under the Act.

We now address your arguments against disclosure of the remaining submitted information. Section 552.107(1) of the Government Code protects information coming 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. Open Records Decision No. 676 at 6-7. 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. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is

³We 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.

involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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. Finally, 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. *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 state the e-mails you have marked are communications between individuals you have identified as university attorneys and university employees. You state the communications were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the marked information. Accordingly, the university may withhold the information you have marked under section 552.107 of the Government Code.⁴

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record,

⁴Because our ruling is dispositive as to this information, we do not address your remaining arguments against disclosure of portions of this information.

that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code §. 552.116. You state the university is an institution of higher education as defined by section 61.003 of the Education Code. You state a portion of the remaining information consists of audit working papers created by university auditors during an audit of a component system of the university. You state audits such as this are authorized by the Texas Internal Auditing Act, chapter 2101 of the Texas Government Code. *See id.* §§ 2102.007 (relating to duties of an internal auditor), .005 (requiring state agencies to conduct internal audits), .003 (defining types of audits). Based on your representations and our review, we agree the information at issue consists of audit working papers as defined in section 552.116(b)(2) of the Government Code. Accordingly, the university may withhold the remaining information you marked under section 552.116.⁵

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." *Id.* § 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

⁵Because our ruling is dispositive as to this information, we do not address your remaining argument against its disclosure.

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 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. 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 has also concluded 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 of section 552.111). 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 state the information you have marked consists of the opinions, advice, and recommendations of university employees pertaining to the university's policies. You further state the final versions of draft documents have been, or will be, publicly released. Upon review, we find portions of the information you have marked pertain to the university's policymaking processes. Accordingly, the university may withhold the information we have marked under section 552.111. The remaining information you marked under section 552.111 either consists of factual information, internal administrative or personnel matters, or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the university. We conclude you have failed

to demonstrate this remaining information constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the university. Therefore, none of the remaining information may be withheld under section 552.111.

You assert a portion of the remaining information is excepted by section 552.106 of the Government Code. This section excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” Gov’t Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, this section is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See* Open Records Decision No. 460 at 1-2 (1987), 367 (1983) (statutory predecessor applied to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act); *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). Section 552.106 only protects policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

In this instance, you assert the remaining information you have marked under section 552.106 contains recommendations, opinions, and advice that will be used in the preparation of proposed legislation that is inextricably intertwined with the university and its policy mission. You state the information reflects the seeking of advice from university officials by legislative staff. Based on your representations and our review of the information at issue, we agree the information we have marked constitutes a draft or working paper used in the preparation of proposed legislation for purposes of section 552.106. However, you have not demonstrated how the remaining information constitutes recommendations, opinions, or advice for purposes of section 552.106. Therefore, no portion of the remaining information may be withheld on that basis.

Section 552.108 of the Government Code provides, in relevant part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. Section 552.108(b)(1) protects internal law enforcement and prosecution records, the release of which would interfere with ongoing law enforcement and prosecution efforts in general. A governmental body claiming subsection 552.108(a)(1) or subsection 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert the remaining information in the university police department's Strategic Plan is excepted from disclosure under subsections 552.108(a)(1) and (b)(1). You state the Strategic Plan reveals weaknesses of the department and release would compromise the department's ability to secure the campus. In addition, you provide a statement from the department's Chief of Police in which he argues the Strategic Plan contains specific recommendations regarding vulnerabilities in the department's operations and release could increase the potential of criminal activity. However, you have not demonstrated how the remaining information at issue would interfere with the detection, investigation, or prosecution of a particular crime for purposes of subsection 552.108(a)(1) or with law enforcement efforts in general for purposes of subsection 552.108(b)(1). Thus, the university may not withhold any portion of the remaining information in the Strategic Plan under section 552.108.

Finally, you claim a portion of the remaining information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "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.

(b) Notwithstanding any other provision of this chapter, 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. You seek to withhold a teleconferencing access code under section 552.136. You explain the teleconferencing telephone number and access codes do not change and can be used to access teleconferencing accounts of the university in order to arrange long distance telephone calls. You also seek to withhold the link to a website that would reveal a frequent flyer account number. Upon review, we determine the university must withhold the information you have marked under section 552.136 of the Government Code.

In summary, the e-mails you have marked pursuant to section 552.002 are not subject to the Act and need not be released in response to this request. The university may withhold the information you have marked under sections 552.107 and 552.116, and the information we have marked under sections 552.111 and 552.106. The university must withhold the information you have marked under section 552.136. The remaining information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/eeg

Ref: ID # 417478

Enc. Submitted documents

c: Requestor
(w/o enclosures)