



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2011

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

OR2011-09146

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# 420374 (OGC# 136176).

The University of Texas System (the "system") received a request for (1) documents and correspondence pertaining to the creation of the "special adviser to the regents" position and development of the position's job description; (2) documents and correspondence pertaining to the interviewing and hiring of a named individual; (3) a named regent's correspondence with system employees since his appointment; and (4) transcripts of any recorded communications regarding hiring the "special adviser to the regents." You state the system has provided some of the requested information to the requestor with certain information withheld pursuant to sections 552.024 and 552.147 of the Government Code, as well as under sections 552.101, 552.130, and 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).¹ You also state the system will withhold some of the remaining requested information pursuant to section 552.024 and under section 552.137 pursuant to Open

¹Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Gov't Code § 552.024(a)-(c). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b). The previous determination issued in ORD 684 authorizes all governmental bodies to withhold ten categories of information, including I-9 forms and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; Texas driver's license numbers under section 552.130; and e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

Records Decision No. 684. You claim a portion of the remaining requested information is not subject to the Act. You further claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you have marked portions of the submitted information as being non-responsive to the request for information. Upon review, we agree this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, you assert the University of Texas Electronic Identification Numbers ("UTEIDs") contained in the requested records are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You inform our office that, when combined with an individual's password, the UTEID serves as "the required log on protocol to access the computer mainframe, the [s]ystem's centralized hub that runs all its high-level electronic functions." You indicate the UTEIDs are used solely to access the system's computer mainframe and have no other significance other than their use as tools for the maintenance, manipulation, or protection of public information. Based on your representations and our review, we find the UTEIDs contained in the requested records do not constitute public information under section 552.002 of the Government Code. We, therefore, conclude the UTEIDs are not subject to the Act and need not be released to the requestor.

You assert portions of the remaining information are confidential under both common-law and constitutional privacy. 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 section encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found a public employee's allocation of part of the employee's salary to a voluntary investment, health, or other program offered by the employer is a personal investment decision that is highly intimate or embarrassing. *See* Open

²We 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.

Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked medical information, as well as optional insurance and benefit information, that we find is not of legitimate concern to the public. Therefore, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.³ You have not demonstrated, however, how the remaining information you seek to withhold is highly intimate or embarrassing. Consequently, the system may not withhold any of the remaining information at issue on the basis of common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to the remaining information at issue. Consequently, the system may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). The system must withhold the date of birth you have marked in the remaining information under section 552.102(a) of the Government Code.

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

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). 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.*, 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 state the e-mail strings and attachments you have marked consist of communications between system attorneys and system officials that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to the information at issue. We note, however, one of the individual e-mail messages in a privileged e-mail string consists of a communication with a party you have not shown to be privileged. Therefore, if this individual e-mail message, which we have marked, exists separate and apart from the otherwise privileged e-mail string to which it is attached, the system may not withhold the individual e-mail message under section 552.107(1) of the Government Code. If the marked e-mail message does not exist separate and apart from the privileged e-mail string, the system may withhold it under

section 552.107(1) of the Government Code.⁴ Regardless, the system may withhold the remaining information you have marked under section 552.107(1) of the Government Code.⁵

You assert some of the remaining e-mail strings 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.

This office has also concluded 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.

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You contend the e-mail strings and attachments you have marked under section 552.111 consist of communications between system officials regarding various system policy issues. Based on your arguments and our review, we find you have sufficiently demonstrated how most of the information you have marked pertains to the system's policymaking processes. We also find portions of this information contain the advice, recommendations, and opinions of system officials regarding the policy issues. Furthermore, you indicate the draft document attachment will be released to the public in its final form. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to some of the information at issue, which we have marked. Accordingly, the system may withhold the information we have marked under section 552.111 of the Government Code. The remaining information at issue, however, either does not reveal advice, recommendations, or opinions or pertains to routine administrative and personnel matters, which you have not explained are of a broad scope that affect the system's policy mission. Consequently, the remaining information you seek to withhold is not excepted under the deliberative process privilege and the system may not withhold that information under section 552.111 of the Government Code.

Section 552.1235 of the Government Code excepts "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). "Institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an "institution of higher education" as 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). We agree the system and its component institutions qualify as "institutions of higher education" under section 61.003 of the Education Code. Further, because section 552.1235 of the Government Code 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 corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

You have marked the information you seek to withhold under section 552.1235. You contend the marked information identifies donors to The University of Texas at Austin (the "university"). Based upon your representations and our review, we agree the names and other identifying information you have marked identify persons as actual donors to the university. Accordingly, we conclude the system must withhold the information you have marked under section 552.1235 of the Government Code.

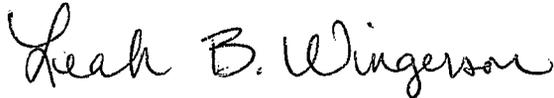
In summary, the UTEIDs are not subject to the Act and the system need not release them to the requestor. The system must withhold the medical and personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the date of birth you have marked under section 552.102(a) of the Government Code. The system may generally withhold the e-mail strings and attachments

you have marked under section 552.107(1) of the Government Code, but may not withhold the non-privileged individual e-mail message we have marked, if the message exists separate and apart from the otherwise privileged e-mail string to which it is attached. The system may withhold the information we have marked under section 552.111 of the Government Code. The system must withhold the donor information you have marked under section 552.1235 of the Government Code. The system must release the remaining information.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 420374

Enc. Submitted documents

c: Requestor
(w/o enclosures)