



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2011

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

OR2011-09483

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# 422688 (OGC# 136834).

The University of Texas System (the "system") received a request for e-mails sent by members of the Board of Regents to specified individuals during a certain time period. You state the system does not maintain information responsive to the request for e-mails to the Texas A&M System Regents, the Governor's Office, or Jeff Sandefer.¹ You state the system is releasing some of the responsive information. You also state the system will withhold some of the requested 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).² You claim the submitted information is excepted from disclosure under

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The 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, without the necessity of requesting an attorney general decision.

sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note you have marked information, and we have marked information, that is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release such information in response to this request.

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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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 involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas 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). 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 that the confidentiality of a

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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 constitute communications between the system's attorneys and system employees and officials that were made for the purpose of facilitating the rendition of professional legal services to the system. You state this information was made in confidence and has maintained its confidentiality. 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 the privileged e-mail strings 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 strings 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 strings, the system may withhold it under section 552.107(1) of the Government Code. Regardless, the system may withhold the remaining information you have marked under section 552.107(1) of the Government Code.⁴

You assert 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 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

⁴As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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). 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.

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.

You explain most of the remaining information consists of "communications between and among employees and officials of the [s]ystem and its component institutions regarding various policy issues." You state the information at issue also contains draft documents pertaining to the policymaking functions of the system, and you state these draft documents have been released in their final form. Based on your representations and our review of the information at issue, we find the system has demonstrated the applicability of section 552.111 to some of the information at issue. Upon review, however, we find some of the information at issue is general administrative or purely factual information or was obtained from individuals with whom you have not demonstrated the system shares a privity of interest. Thus, we find you have failed to show how this information consists of advice, opinions, or recommendations on the policymaking matters of the system. Therefore, we find you have failed to demonstrate the applicability of section 552.111 to this information,

which we have marked for release. Accordingly, with the exception of the information we have marked, the system may withhold the remaining information you have marked under section 552.111 of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024.⁵ *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. It is unclear whether the information we have marked that pertains to a system official is actually his home address and home telephone number. Therefore, to the extent the information we marked consists of the home address and telephone number of the system official and he timely requested confidentiality under section 552.024, the system must withhold such information under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). We have marked personal e-mail addresses that must be withheld under section 552.137, unless the owner of an e-mail address has affirmatively consented to its release.

In summary, 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 strings to which it is attached. With the exception of the information we have marked for release, the system may withhold the information you have marked under section 552.111 of the Government Code. The system must withhold the information we marked under section 552.117(a)(1) of the Government Code to the extent it consists of the home address and telephone number of a system official who timely requested confidentiality under section 552.024 of the Government Code. The system must

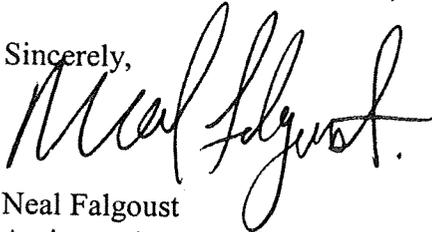
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the e-mail addresses we marked under section 552.137 of the Government Code. The remaining responsive 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 422688

Enc. Submitted documents

c: Requestor
(w/o enclosures)