



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 2, 2012

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

OR2012-01706

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# 444299 (ORR# 140776).

The University of Texas System (the "system") received a request for all correspondence involving MyEdu Corporation ("MyEdu"). You state the system has released some of the requested information. You also state the system will withhold information pursuant to sections 552.024, 552.136, and 552.137 of the Government Code and Open Records Decision No. 684 (2009).<sup>1</sup> You claim some of the submitted information is excepted from

---

<sup>1</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), 552.024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor). Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, access device numbers subject to section 552.136(b). *See id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

disclosure under sections 552.107, 552.111, 552.1235, and 552.136 of the Government Code. You also state, and provide documentation showing, you notified the University of California at Berkeley and MyEdu of the system's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

You inform us some of the submitted information, which you have marked, was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-18342 (2011). In that ruling, we determined some of the information at issue was excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.107(1), 552.111, 552.117(a)(1), and 552.136 of the Government Code, but the remaining information was to be released in accordance with copyright law. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, the system must continue to rely on Open Records Letter No. 2011-18342 as a previous determination and withhold or release the submitted information you have marked in accordance with that ruling.<sup>3</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note you have marked some of the submitted information as not being responsive to the request for information. We have marked additional information that is also not responsive to the request because it was created after the system received 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 this information in response to this request.

You assert some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body

---

<sup>2</sup>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.

<sup>3</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

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 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 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). 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. 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 explain the responsive information you have marked under section 552.107 consists of confidential communications between attorneys for and employees and officials of the system that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree the responsive information you have marked constitutes privileged attorney-client communications that the system may withhold under section 552.107.<sup>4</sup> However, we note part of one of the e-mail strings at issue consists of a communication with a nonprivileged party. If the communication with the nonprivileged party, which we have marked, exists

---

<sup>4</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

separate and apart from the e-mail string in which it appears, then the system may not withhold the communication with the non-privileged parties under section 552.107(1).

You assert some of the remaining responsive information is excepted from disclosure under section 552.111 of the Government Code, which 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, 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 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). 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 consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 assert the remaining responsive information you have marked under section 552.111 consists of communications between or among employees and officials of the system, as well as representatives of MyEdu, that relate to various policymaking matters involving MyEdu. You explain the system and MyEdu entered into a contractual relationship on September 13, 2011 and share a common deliberative process, as well as a privity of interest, regarding the communications about that contractual relationship. You further state the system intends to release the final versions of the draft documents at issue. Upon review, we find portions of the remaining responsive at issue, which we have marked, pertain to the system's policymaking processes. Accordingly, the system may withhold the information we have marked under section 552.111. However, we conclude you have failed to demonstrate how the remaining information at issue reveals internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the system. Therefore, you have not demonstrated how the deliberative process privilege applies to the remaining information, and the system may not withhold it under section 552.111.

Section 552.117(a)(1) of the Government Code may be applicable to some of the submitted information.<sup>5</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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). Therefore, the system may only withhold information

---

<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information pertaining to a system official that must be withheld if section 552.117(a)(1) applies.

Section 552.1235 of the Government Code excepts from disclosure “[t]he 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 defines an “[i]nstitution 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.” *See* Educ. Code § 61.003.

You assert the information you have marked under section 552.1235 pertains to an individual who is a system donor and who has not given the system permission to release her name and other identifying information. However, we find you have failed to demonstrate this information identifies the individual in her actual capacity as a donor to the system for purposes of section 552.1235. Accordingly, the system may not withhold the information you have marked under section 552.1235 of the Government Code.

Finally, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, neither University of California at Berkeley nor MyEdu has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any of the remaining information constitutes proprietary information of these organizations, and the system may not withhold any portion of the remaining information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

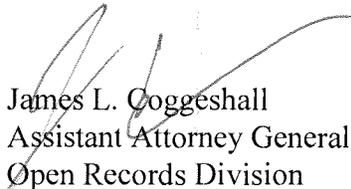
We conclude the following: (1) the system must continue to rely on Open Records Letter No. 2011-18342 as a previous determination and withhold or release the information you have marked in accordance with that ruling; (2) the system may withhold the responsive information you have marked under section 552.107 of the Government Code; however, to the extent the nonprivileged e-mail we have marked exists separate and apart from the submitted e-mail string at issue, the system may not withhold it under section 552.107(1). (3) the system may withhold the information we have marked under section 552.111 of the

Government Code; (4) the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the official concerned timely requested to withhold that information; and (5) the system must release the remaining responsive 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](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 L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/ag

Ref: ID# 444299

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Mara Hancock  
University of California, Berkeley  
c/o Neera Chatterjee  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902  
(w/o enclosures)

Mr. Michael Crosnos  
MyEdu  
1301 South Mopac Expressway, Suite 250  
Austin, Texas 78746  
(w/o enclosures)