



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2012

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

OR2012-04428

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# 448559 (OGC# 141557).

The University of Texas at Austin (the "university") received a request for multiple categories of information concerning the resignation of the university's law school dean and the operation of the University of Texas Law School Foundation (the "foundation"). You state the university will release some of the information. You state the university will redact information under sections 552.117 and 552.136 of the Government Code, Open Records Decision No. 684 (2009), and the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim the submitted information is excepted from disclosure under

¹Section 552.024(c) of the Government Code authorizes a governmental body to redact information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.024(c), .117(a). Section 552.136 of the Government Code permits a governmental body to redact information subject to subsection 552.136(b) without requesting a decision from this office. *See id.* § 552.136(c). Open Records Decision No. 684 serves as a previous determination to all governmental bodies permitting them to redact certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office. *See* Open Records Decision No. 684 (2009). The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process

sections 552.107, 552.111, and 552.1235 of the Government Code. You also state you have notified the foundation of the request and of its right to submit comments to this office stating why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released). We have received comments from an attorney for the foundation. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you explain a portion of the request seeks information created after the university received the present request for information. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See id.* §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1–2 (1990), 452 at 2–3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present request consists of documents the university maintained or had a right of access to as of the date it received the request.

Next, the foundation contends some of the submitted information pertaining to the foundation is not subject to public disclosure under the Act. Section 552.021 of the Government Code provides for public access to “public information,” *see* Gov't Code § 552.021, 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(a). Thus, information collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). The university informs us the information at issue consists of foundation records, and these records are not records of the university. The foundation explains this information was obtained from a university employee who also works part-time for the foundation. The foundation further explains this employee created and maintains these foundation records solely in her capacity as a foundation employee, and the records are not

under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 those submitted to this office.

maintained for any university purpose or function. The foundation explains these records were not created “for” the university, but were created and maintained for its own activities. Thus, the foundation argues, these records are not maintained in connection with the official business of the university. Based on these representations and our review of the information, we agree the information we have marked 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. Accordingly, we agree this information is not subject to the Act, and the university need not release it in response to this particular request.

Next, we note some of the submitted information was responsive to two previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-02897 (2012) and 2012-04417 (2012). In those rulings we concluded the university may withhold portions of the information at issue under either sections 552.107 or 552.111 of the Government Code, and the remaining information at issue must be released. As we have no indication the law, facts, or circumstances on which those prior rulings were based have changed, you may continue to rely on Open Records Letter Nos. 2012-02897 and 2012-04417 (2012) as previous determinations and withhold or release the information we have marked in accordance with those prior rulings. *See* Open Records Decision No. 673 at 6–7 (2001) (so long as law, facts, 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).

We turn next to the remaining information and the university’s claimed exceptions. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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). 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). Section 552.107(1) generally excepts an entire communication 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 were sent between attorneys and employees for the university in order to facilitate the rendition of legal services. You explain these e-mails were intended to be, and have remained, confidential. Based on your representations and our review, we agree the university may withhold the remaining information you have marked under section 552.107(1) of the Government Code.³

Section 552.111 of the Government Code excepts from public 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. Section 552.111 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 that 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. The 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

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

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 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 contend the e-mail correspondence and attachments you have marked under section 552.111 consist of communications between university officials regarding various university policy issues. Furthermore, you state the attachments consisting of draft documents will be released to the public in their final form. Based on these representations and our review, we conclude the information we have marked consists of advice, opinions, and recommendations on policymaking matters. Accordingly, the university may withhold the information we have marked under section 552.111 of the Government Code. The remaining information at issue, however, does not reveal advice, opinions, or recommendations on policymaking matters. Accordingly, the university may not withhold the remaining information under section 552.111 of the Government Code.

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 state the information you have marked pertains to individuals who are university donors and who have not given the university permission to release their names and other identifying information. However, the individuals at issue have professorships, programs, and multiple portions of the university named for them in honor of their contributions. Accordingly, we

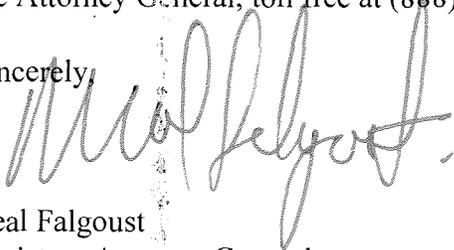
conclude the information you have marked may not be withheld under section 552.1235 of the Government Code.

In summary, the information we have marked is not subject to the Act, and the university need not release it in response to this request. The university may continue to rely on Open Records Letter Nos. 2012-02897 and 2012-04417 as previous determinations and withhold or release the information we have marked in accordance with those prior rulings. The university may withhold the information you have marked under section 552.107 of the Government Code. The university may withhold the information we marked under section 552.111 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,



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Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 448559

Enc. Submitted documents

c: Requestor
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