



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 16, 2012

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

OR2012-11001

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# 458945 (UT OGC Numbers 143251, 143257, 143268, 143269, 143382, 143756).

The University of Texas System (the "system") received six requests for a risk assessment document, correspondence, and documents regarding the cancellation of a specified event, as well as documentation of other events that have and have not been approved by the system in the last five years. You state you have no information responsive to documentation of other events that have and have not been approved by the system in the last five years.<sup>1</sup> You state you are releasing some requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, 552.1235, 552.137, and 552.152 of the Government Code. Additionally, you state release of some of the requested information may implicate the proprietary interests of Focused Advocacy, LLC. Accordingly, you state, and provide documentation showing, you notified Focused Advocacy, LLC of the request for information and of its right to submit

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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 information, portions of which consist of representative samples.<sup>2</sup> We have also received and considered comments from one of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released.)

Initially, we note you have marked some of the submitted information as non-responsive. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to the present requests.

Section 552.107 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

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<sup>2</sup>We assume that the “representative samples” of records submitted to this office are 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.

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-mails you have marked under section 552.107 consist of attorney-client privileged communications that were made between system employees, officials, and attorneys and employees of the system's component institutions for the purpose of rendering professional legal services to the system. You identify the parties to these communications and state the communications 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 most of the information at issue. Accordingly, the system may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged e-mail strings include e-mails from non-privileged parties that are separately responsive to the instant requests. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they are included, the system may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they are included, the system may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code. However, with respect to the remaining information you seek to withhold under section 552.107, we find you have failed to demonstrate that the communications were made for the purpose of the rendition of legal services. As you have failed to establish the applicability of section 552.107 to the remaining information at issue, it may not be withheld on that basis.

You seek to withhold some of the remaining information under section 552.108 of the Government Code. Section 552.108(b)(1) of the Government Code is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See Open Records Decision No. 562 at 10 (1990)* (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law

enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 508 (1988) (release of dates of prison transfer could impair security), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from Department of Public Safety would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the information at issue is maintained by the system's Office of the Director of Police ("ODOP"), which is a law enforcement agency. You state this information consists of a threat assessment conducted by ODOP related to a boxing match and information ODOP gathered in conducting the assessment. You indicate the information you seek to withhold under section 552.108 consists of ODOP's fact-gathering and analysis regarding the boxing match. You contend release of this information would interfere with law enforcement efforts and compromise the ability of the University of Texas at El Paso ("UTEP"), the system, and other law enforcement agencies to secure the UTEP campus, not only for the boxing match, but for future events at UTEP as well. Upon review of your arguments and the information at issue, we find you have demonstrated that release of the information at issue would interfere with law enforcement. Therefore, the system may withhold the information at issue, which we have marked, under section 552.108(b)(1) of the Government Code.<sup>3</sup>

You seek to withhold some of remaining information, including the e-mails from the non-privileged parties in the otherwise privileged e-mail strings, under section 552.111 of the Government Code. Section 552.111 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); *see also* Open Records Decision No. 538 at 1-2 (1990).

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

In Open Records Decision No. 615 (1993), 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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 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 also has concluded that 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.

You state the information you have marked under section 552.111 of the Government Code consists of communications between system employees, officials, and attorneys and employees of the system's component institutions related to policymaking matters of the system. You state the communications contain advice, recommendations and opinions regarding policy issues involving a boxing match. You further state a portion of the information you have marked under section 552.111 consists of draft documents intended for public release in their final form. Based on your representations and our review, we find the system may withhold the information we have marked under section 552.111 of the Government Code. However, we find you have failed to demonstrate how the system shares a privity of interest or common deliberative process with some of the individuals in the remaining communications. Additionally, we note some of the remaining information consists of general administrative or purely factual information. Thus, we find you have not demonstrated how this information consists of advice, opinions, or recommendations pertaining to policymaking matters of the system. Accordingly, we conclude the system may

not withhold any of 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 donors to the system and the system’s component institutions and who have not given the system permission to release their names and other identifying information. However, one of the individuals at issue is publicly identified as a donor on the website of one of the system’s component institutions. Additionally, we find you have failed to demonstrate how the remaining information identifies the other individual at issue in his actual capacity as a donor to the system for purposes of section 552.1235. Accordingly, we conclude the information you have marked may not be withheld under section 552.1235 of the Government Code.

You have marked portions of the remaining information under section 552.117 of the Government Code. We note additional portions of the remaining information may be subject to section 552.117. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). We note section 552.117(a)(1) encompasses an official’s or employee’s personal cellular telephone or pager number if the cellular telephone or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials’ and employees’ private vehicles and intended for official business). 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 information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only 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 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. However, we note the system has marked the telephone number of an individual who is not a current or former employee or official of the system. Accordingly, we have marked this information for release. Therefore, except for the information we have marked for release, the system

must withhold the information you have marked, and the additional cellular telephone numbers we have marked if the cellular telephone service is not paid for by a governmental body, under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code.

You have marked portions of the remaining information under section 552.137 of the Government Code. We note additional portions of the remaining information are subject to section 552.137. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the system must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 unless the owners of the addresses affirmatively consent to their release.

You claim portions of the remaining information are subject to section 552.152 of the Government Code, which provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. Upon review, we find you have not demonstrated release of the remaining information would subject an employee or officer to a specific substantial risk of physical harm. Accordingly, the system may not withhold the remaining information under section 552.152 of the Government Code.

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, this office has not received comments from Focused Advocacy, LLC. We therefore have no basis for concluding Focused Advocacy, LLC has a protected proprietary interest in the information at issue. *See id.* § 552.110(a)-(b); 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, that release of the 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 (1990). Accordingly, the system may not withhold any portion of the information at issue on the basis of any proprietary interest Focused Advocacy, LLC may have in the information.

In summary, the system may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they are included, the system may not withhold them under section 552.107(1) of the Government Code. The system may withhold the information we have marked under section 552.108(b)(1) of the Government Code and the information we have marked under section 552.111 of the Government Code. With the exception fo th information we have marked for release, the system must withhold the information you have marked, and the cellular telephone numbers we have marked, under section 552.117(a)(1) to the extent the employees at issue timely requested confidentiality under section 552.024, and the cellular service is not paid for by any governmental body. The system must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 unless the owners of the addresses affirmatively consent to their release. The remaining 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](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,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/eb

Ref: ID# 458945

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

Department of Homeland Security  
SAC El Paso  
4191 North Mesa  
El Paso, Texas 79902  
(w/o enclosures)