



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 19, 2012

Ms. Neera Chatterjee  
Ms. Zeena Angadicheril  
Office of the General Counsel  
The University of Texas System  
201 West Seventh Street  
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OR2012-11210

Dear Ms. Chatterjee and Ms. Angadicheril:

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# 459381 (UT OGC Nos. 143666, 143667, and 143849).

The University of Texas at Austin (the "university") received three requests for information pertaining to the university's sales of licensed apparel, including summaries of royalties earned, a list of top licensees by royalty paid, any communications regarding the Worker's Rights Consortium or the Free Labor Association (the "FLA") over a specified time, contracts between apparel companies and the university, and communications containing specified words relating to student activism. You state the university is releasing some of the requested information. You further state the university has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You also state you will redact information under section 552.136 of the Government Code and e-mail addresses of members of the public

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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 under the Act. The DOE has determined 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>.

subject to section 552.137 pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You argue some of the requested information does not consist of public information subject to the Act. You claim portions of the remaining requested information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you state release of some of the requested information may implicate the proprietary interests of the FLA, The Collegiate Licensing Company (the "CLC"), BC Sports, Nike USA, Inc. ("Nike"), and TYR Sport, Inc. ("TYR"). Accordingly, you state, and provide documentation showing, you notified the CLC, the FLA, BC Sports, Nike, and TYR of the request for information and of their right to submit 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 received comments from the FLA and Nike. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

You state, and provide documentation showing, the university sought clarification of a portion of one of the requests. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You state the university has not received clarification of the portion of the request at issue. Thus, for the portion of the requested information for which the university has not received clarification, we find the university is not required to release information in response to that portion of the request. However, if the requestor clarifies that portion of the request for information, the university must seek a ruling from this office before withholding any responsive information from the requestor at issue. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

You indicate, and we agree, portions of the submitted information were at issue in Open Records Letter No. 2012-09051 (2012). In that ruling, we determined portions of the submitted are not public information subject to the Act. In addition, we ruled the university may generally withhold the information you marked under section 552.107(1) of the

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<sup>2</sup>Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting a decision from this office.

<sup>3</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.

Government Code, unless the non-privileged e-mails we marked exist separate and apart from the privileged e-mail strings in which they are included and may withhold the information we marked under section 552.111 of the Government Code. Finally, we ruled, if the employees whose cellular telephone numbers were at issue timely requested confidentiality for their personal information and the cellular telephone service is not paid for by a governmental body, the university must withhold the marked cellular telephone numbers pursuant to section 552.117(a)(1) of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the university must continue to rely on the prior ruling as a previous determination and withhold or release the identical information, which we have marked, in accordance with Open Records Letter No. 2012-09051.<sup>4</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 information is or is not excepted from disclosure). We note, however, portions of the submitted information were not the subject of Open Records Letter No. 2012-09051. Thus, we will address the submitted arguments against disclosure of this information.

Section 552.107(1) protects information coming 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 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)(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

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<sup>4</sup>As our ruling is dispositive for this information, we need not address the arguments against its disclosure.

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 that 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 a portion of the remaining information, which we have marked, consists of attorney-client communications between university employees and attorneys for the purpose of rendering professional legal services to the university. You state these 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 the information at issue. Accordingly, the university may withhold the information we have marked under section 552.107(1) of the Government Code.

You seek to withhold some of remaining information under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “[a]n 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).

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 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).

You state some of the remaining information consist of communications between and among university employees and officials that contain advice, opinions, and recommendations regarding policy matters. However, we find the remaining information you seek to withhold consists of general administrative and purely factual information. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information you seek to withhold, and the university may not withhold this information pursuant to the deliberative process privilege under section 552.111.

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 any comments as to why the information should not be released from Nike, BC Sports, TYR, or CLC.<sup>5</sup> We therefore have no basis for concluding these third parties have a protected proprietary interest in the remaining 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 university may not withhold any portion of the remaining information on the basis of any proprietary interest these third parties may have in the information.

In summary, the university must continue to rely on Open Record Letter No. 2012-09051 as a previous determination and withhold or release the identical information in accordance with Open Records Letter No. 2012-09051. The university may withhold the information we have marked under section 552.107(1) of the Government Code. 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

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<sup>5</sup>Although we received comments from Nike stating the company would send arguments against disclosure of its information, to this date this office has not received any such comments.

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,



**Melanie J. Villars**  
Assistant Attorney General  
Open Records Division

MJV/bs

Ref: ID# 459381

Enc. Submitted documents

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(w/o enclosures)

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