



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2012

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

OR2012-11241

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# 459493 (OGC# 143379).

The University of Texas System (the "university") received a request for all correspondence sent or received by a named individual regarding a second named individual or Southwestern Medical Foundation ("Southwestern") during a specified time period. You state some of the information is being released. You state the university will redact information as permitted by section 552.024(c) of the Government Code and Open Records Decision No. 684 (2009).¹ You further state release of the remaining requested information may implicate the interests of Southwestern. Accordingly, you provide documentation showing you have notified Southwestern of the request and its right to submit arguments to this office. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should

¹Section 552.024(c) authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See 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), .024(c-2) (governmental body withholding information pursuant to section 552.024(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 e-mail addresses of members of the public under section 552.137 of the Government Code without the necessity of requesting an attorney general decision.

not be released). You also claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.1235 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Section 552.107(1) of the Government Code 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 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). 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 state the information you have marked consists of communications between individuals you have identified as attorneys, officials, and employees of the university. You state the communications were made for the purpose of facilitating the rendition of legal services, and

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 that submitted to this office.

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 you have marked. Accordingly, the university may generally withhold the information you have marked under section 552.107 of the Government Code. However, we note some of the otherwise privileged e-mail strings include communications with parties who you have not identified as privileged. If these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they appear, then the university may not withhold the communications with the non-privileged parties under section 552.107(1) of the Government Code.

You raise section 552.111 of the Government Code for a portion of the remaining information and for the non-privileged e-mails that appear in the otherwise privileged e-mail strings. 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, orig. proceeding); 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, orig. proceeding). 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 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).

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order 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 state the information you have marked and the non-privileged e-mails in the otherwise privileged e-mail strings consist of internal communications among university officials and employees containing advice, opinion, and recommendations concerning various policy issues. Upon review, we find the information we have marked consists of advice, opinions, or recommendations concerning the university's policymaking processes. Therefore, the university may withhold the marked information under section 552.111. However, we find the remaining information does not consist of advice, opinions, or recommendations, or is purely factual in nature. In addition, a portion of this information consists of communications with third parties. You have not identified the third parties at issue or explained the nature of the relationship between the university and these third parties; thus, we find you have failed to establish a privity of interest with those third parties for purposes of section 552.111. Therefore, the remaining information may not be withheld 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 assert the information you have marked in the remaining information contains the identifying information of university donors and is confidential pursuant to section 552.1235 of the Government Code. However, we note that the individuals you have marked have divisions of the university and professorships named after them or are otherwise publicly recognized as donors on the internet. Therefore, the university may not withhold the names of these donors under section 552.1235.

In summary, the university may withhold the information you have marked under section 552.107(1) of the Government Code, except to the extent the non-privileged e-mails

we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear. The university may withhold the information we marked under section 552.111 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 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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 459493

Enc. Submitted documents

c: Requestor
(w/o enclosures)