ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2012

Mr. R. Brooks Moore
Managing Counsel, Governance
Office of General Counsel
The Texas A&M University System
301 Tarrow Street 6th Floor
College Station, Texas 77840-7896

OR2012-18460

Dear Mr. Moore:

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# 471753 (TAMU ID Nos. 12-438, 12-439 and 12-440).

Texas A&M University (the "university") received three requests from the same requestor for communications sent or received by three named officials of the university during specified time periods. You claim the requested information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the representative samples of information you submitted.[1]

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. Section 51.971 of the Education Code provides in part:

> (e) Information is excepted from [required public disclosure] if it is collected or produced:
>
> . . .

[1]This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

> (2) by a systemwide compliance office for the purpose of reviewing compliance processes at a component institution of higher education of a university system.

Educ. Code § 51.971(e)(2); *see id.* § 51.971(a)(1)(A) (defining "compliance program" as meaning "a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations and policies, including matters of . . . ethics and standards of conduct"). You have marked the information the university seeks to withhold under section 552.101 in conjunction with section 51.971(e)(2). You state the marked information is a review of computing and information services at the university. You state the System Internal Audit Department (the "department") prepared the review for the purpose of reviewing compliance processes at the university, a component of the Texas A&M University System (the "system"). You explain the department is part of the system's compliance program and conducted the review to assess and ensure employees' compliance with applicable laws, rules, regulations, and policies. Based on your representations and our review, we conclude the university must withhold the review, which we have marked, under section 552.101 of the Government Code in conjunction with section 51.971(e)(2) of the Education Code. We conclude the remaining information you have marked does not fall with the scope of section 51.971(e)(2) and may not be withheld on that basis under section 552.101.

Next, we address your claim under section 552.107(1) of the Government Code, which 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 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. *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)(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 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. *See 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 have marked the information the university seeks to withhold under section 552.107(1). You state the marked information consists of communications between attorneys for and officials and administrators of the university. You have identified the parties to the communications. You state the communications were made in connection with the rendition of professional legal services to the university and were intended to be and remain confidential. Based on your representations and our review, we conclude the university may withhold the information you have marked under section 552.107(1) of the Government Code.

Lastly, we address your claims under sections 552.104 and 552.111 of the Government Code for the remaining information at issue. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of this exception is to protect a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990).

You state the university is engaged in ongoing negotiation of an agreement with Texas Wesleyan University ("TWU"), under which the university would assume ownership and operation of TWU's law school. You contend that because an agreement has not been finalized, the release of information related to the negotiations "would create the potential for harm to the university's ability to negotiate a final agreement[.]" Having considered your arguments and reviewed the information you seek to withhold, we find you have not demonstrated the information at issue is related to a competitive matter for purposes of section 552.104(a). We therefore conclude the university may not withhold any of the submitted information under section 552.104 of the Government Code.

Section 552.111 of the Government Code 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 this privilege is to protect advice, opinion, and recommendation in the decisional process and 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 (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 from disclosure only those internal communications that consist of advice, recommendations, and opinions 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) (Gov't Code § 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). Moreover, 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 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.

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 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 (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). 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 a 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 contend the submitted information the university seeks to withhold under section 552.111 of the Government Code consists of policymaking communications and documents. Based on your representation and our review, we conclude the information we

have marked implicates the university's policymaking processes and may be withheld under section 552.111. Although you seek to withhold other information on this basis, we note the remaining information consists mostly of communications between the university and the Texas Higher Education Coordinating Board (the "board"). You have not explained how or why the university and the board would share a privity of interest or common deliberative process with regard to the matter to which the information at issue pertains. We also note the remaining information at issue that does not consist of communications with the board is generally factual. We therefore conclude the university may not withhold any of the remaining information under section 552.111.

In summary, the university (1) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(2) of the Education Code; (2) may withhold the information you have marked under section 552.107(1) of the Government Code; and (3) may withhold the information we have marked under section 552.111 of the Government Code. The rest of the submitted 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,

James W. Morris III

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 471753

Enc: Submitted documents

c: Requestor
(w/o enclosures)