



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2012

Ms. Carol Longoria
Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2012-20070

Dear Ms. Longoria:

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# 472417 (UT OGC# 146423).

The University of Texas at Austin (the "university") received a request for eight categories of information pertaining to a specified study. You state the university does not have information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You further state release of portions of the submitted information may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the university notified the Witherspoon Institute, KNW Networks, Inc. d/b/a Knowledge Networks, and The Lynde and Harry Bradley Foundation of the request for information and their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

¹The 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).

Initially, we note the information contained in Tabs 6, 7, 8, and 9 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-19336 (2012). In that ruling, we determined, in part, the university must (1) withhold the information we marked under section 552.101 in conjunction with common-law privacy; (2) withhold the information we marked under section 552.117(a)(1), if the marked information consists of the home telephone number or personal cellular telephone number of an individual who timely requested confidentiality under section 552.024; (3) withhold the e-mail addresses we marked under section 552.137, unless the owners of the addresses affirmatively consent to their release or subsection 552.137(c) applies; and (4) release the remaining information, but any information protected by copyright, may only be released in accordance with copyright law. With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude, as we have no indication the law, facts, or circumstances on which the prior ruling was based have changed, the university must continue to rely upon Open Records Letter No. 2012-19336 as a previous determination and withhold or release the identical information contained in Tabs 6, 7, 8, and 9 in accordance with that ruling. *See* Open Records Decision No. 673 (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 will address your arguments for the remaining information not encompassed by the previous ruling.

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 contained in Tab 11 consists of communications between university attorneys and university personnel or officials regarding issues involving the specified study. You contend the communications were made for the purpose of providing legal counsel and advice. You 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 the information contained in Tab 11. Accordingly, the university may withhold the information contained in Tab 11 under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code 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); *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 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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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.

This office has also 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 of section 552.111). 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 contained in Tab 10 consists of internal communications and draft documents containing advice, recommendations, and opinions from the office of the Director of Public Affairs for the College of Liberal Arts in conjunction with the university's Office of Media Relations regarding the university's policies regarding media relations. We understand the draft documents will be released in their final form. Based on your representations and our review, we find some of the information contained in Tab 10 consists of advice, opinions, or recommendations regarding the university's media relations policy. Therefore, the university may withhold the information we have marked under section 552.111 of the Government Code. However, we find some of the remaining information contained in Tab 10 to be general administrative information or purely factual in nature. You have not explained how this information constitutes internal advice, recommendations, or opinions regarding policy making issues. Additionally, some of this information has been communicated with individuals you have not demonstrated the university shares a privity of interest or common deliberative process. Therefore, we find you have failed to establish the applicability of section 552.111 to the remaining information contained in Tab 10. Accordingly, the university may not withhold any of the remaining information contained in Tab 10 under section 552.111 of the Government Code.

We note the remaining information contains information subject to section 552.117 of the Government Code.² Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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 the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) 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 the information. Therefore, if the individuals whose information we have marked timely requested confidentiality under section 552.024 and the cellular telephone services are not paid for by a governmental body, the university must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individuals whose information is at issue did not make timely elections under section 552.024 or if the cellular telephone services are paid for by a governmental body, the university may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

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. Accordingly, the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or subsection 552.137(c) applies.

In summary, the university must continue to rely on Open Records Letter No. 2012-19336 as a previous determination and withhold or release the identical information contained in Tabs 6, 7, 8, and 9 in accordance with that ruling. The university may withhold the information contained in Tab 11 under section 552.107(1) and the information we have

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked in Tab 10 under section 552.111 of the Government Code. If the individuals whose information we have marked timely requested confidentiality under section 552.024 and the cellular telephone services are not paid for by a governmental body, the university must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Unless the owners have affirmatively consented to their release or subsection 552.137(c) applies, the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.³

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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/dls

Ref: ID# 472417

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released contains the requestor's e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. See Gov't Code § 552.137(b). Should the university receive another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.

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