



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2013

The Honorable Judith Zaffirini
Texas Senate
P.O. Box 12068
Capitol Station
Austin, Texas 78711

OR2013-08637

Dear Senator Zaffirini:

Pursuant to section 552.008(b-1) of the Government Code, you seek a decision from this office as to whether certain information you received from the University of Texas System, the ("system"), pursuant to section 552.008 of the Government Code is considered confidential information for purposes of that section. Your request was assigned ID# 489395.

Initially, you inform us that on March 8, 2013, you submitted a request to the system seeking "all emails, correspondence, documents, and any other records related to conversations, documents, interactions, meetings, reports, or exchanges about [system] President Bill Powers, that included any member of the [system] Board of Regents," as well as certain system personnel, and members or representatives of Empower Texas or the Texas Public Policy Foundation, for a specified time period.¹ In your March 8, 2013 request, you state you are making the request "[c]onsistent with my legislative right of access to information defined in Section 552.008 of the Government Code," and that such request was made "for legislative purposes." In response to your request, the system provided you with certain documents after labeling them confidential in accordance with section 552.008(b).² We

¹We note you submitted a follow-up letter to the system dated March 11, 2013, clarifying your original request of March 8, 2013.

²We note the system informs us that some of the information at issue was previously submitted to our office under section 552.301 of the Government Code in response to an earlier public information request received by the system. That ruling request resulted in the issuance of Open Records Letter No. 2013-06785 (2013). However, as the instant request for a decision was made by your office pursuant to section 552.008 of the Government Code and not by the system pursuant to section 552.301, we do not rely on Open Records Letter No. 2013-06785 as a previous determination. See Open Records Decision No. 673 (2001)

understand the system provided those documents to you as a member of the Texas Legislature under a confidentiality agreement made in accordance with section 552.008(b).³

Section 552.008 of the Government Code authorizes individual members, agencies, or committees of the Texas Legislature to access otherwise confidential information for official legislative purposes, but ensures the confidentiality of that information is maintained by allowing governmental bodies to require legislators and staff to execute a confidentiality agreement. Section 552.008 provides as follows:

(a) [The Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

³In your initial March 8, 2013 request for information, you state “[b]y signing below I also assure you that I shall hold as confidential any included information that you label as ‘confidential,’ though I will confirm its confidentiality with Attorney General Greg Abbott.” This declaration is then followed by your signature. Therefore, we find that the information provided to you by the system was subject to a confidentiality agreement for the purposes of section 552.008.

- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

Gov't Code § 552.008(a)-(b). Section 552.008 further provides in relevant part that,

A member, committee, or agency of the legislature required by a governmental body to sign a confidentiality agreement under Subsection (b) may seek a decision as provided by Subsection (b-2) about whether the information covered by the confidentiality agreement is confidential under law. A confidentiality agreement signed under Subsection (b) is void to the extent that the agreement covers information that is finally determined under Subsection (b-2) to not be confidential under law.

The member, committee, or agency of the legislature may seek a decision from the attorney general about the matter. The attorney general by rule shall establish procedures and deadlines for receiving information necessary to decide the matter and briefs from the requestor, the governmental body, and any other interested person

...

Id. § 552.008(b-1)-(b-2). This provision of the Act allows legislative requestors to ask this office to independently confirm whether a governmental body's assertions of confidentiality meet the requisite legal standard for withholding the requested information from disclosure. In response to your request for a ruling from this office under section 552.008(b-1), this office notified the system of your request. *See* 1 T.A.C. § 63.3(a) (providing attorney general shall notify governmental body in writing of request for decision made to attorney general under section 552.008(b-1)). On April 19, 2013, the system responded to that notice and submitted a letter brief to this office articulating why the system believes the information you requested meets the legal standard for confidentiality under the Act. *See* 1 T.A.C. § 63.4(a) (setting forth submission requirements for governmental bodies notified by attorney general pursuant to section 63.3 of title 1 of Texas Administrative Code). The system invokes several of the Act's exceptions to required disclosure, including sections 552.101, 552.107, and 552.111 of the Government Code. The system also cites the Rules of Evidence and the

Texas Rules of Professional Conduct.⁴ We have considered the legal briefing submitted by the system and reviewed the representative sample of the documents the system provided to our office as responsive to your request.⁵

We will first address the information the system has marked under section 552.107 of the Government Code. Section 552.107 excepts from disclosure “information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]” Gov’t Code § 552.107(1). *See also* TEX. R. EVID. 503 (enacting the attorney-client privilege). The system asserts the attorney-client privilege protects the documents at issue and thus argues they are excepted from disclosure under section 552.107.

When a governmental body asserts the attorney-client privilege, that governmental body has the burden of providing facts necessary to prove the information at issue satisfies the legal standard for protection under the privilege. *See* Open Records Decision No. 676 at 6-7 (2002). That standard is prescribed by the Texas Rules of Evidence. 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 or includes an attorney is not sufficient to meet the legal standard. The relevant attorney must be “facilitating the rendition of legal services.” Third, the attorney-client

⁴We also understand the system has redacted student identifying information from the information provided to you pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>. Thus, our office is prohibited from reviewing education records, and we will not address the applicability of FERPA to any of the documents at issue, or determine whether FERPA makes information confidential for purposes of section 552.008.

⁵We note section 63.4(a)(1)(C) of Title 1 of the Texas Administrative Code authorizes a governmental body to submit to this office a representative sample of documents in the ruling process under section 552.008 of the Government Code. 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 determine the confidentiality of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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 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 confirm the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

According to the system, the documents for which the system raises the attorney-client privilege under section 552.107 reflect communications involving system attorneys and system personnel in their capacities as those attorneys’ clients. The system has included an “attorney-client matrix” that identifies the parties to the communications at issue and explains their roles within the attorney-client privilege. Additionally, the system’s brief states:

[i]n the marked documents, attorneys for the system and its institutions are providing legal counsel, are gathering information in order to provide legal counsel, or their clients are seeking legal advice from them and include the necessary background information so that counsel would be able to render an opinion on a given situation. From the text of the communications, it is evident that attorneys for the system and its institutions were involved in providing legal counsel to the system and its institutions.

The system further notes “the information has been kept confidential and these documents were maintained only by and between the persons identified and protected by the privilege. They were not intended to be, and have not been, disclosed to parties other than those encompassed by the protection of the attorney-client privilege.”

Accordingly, the system’s factual representations affirm that the documents at issue were: (1) exchanged between system attorneys and personnel; (2) created and distributed for the purposes of the rendering of legal services; and (3) circulated exclusively among system personnel and system attorneys so that confidentiality was maintained at all times.

Therefore, the system has demonstrated the information at issue meets the legal standards for – and is protected by – the attorney-client privilege. We have marked this information.⁶

Next, we address the system's argument under section 552.111 for the remaining information it has marked under this exception. 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 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).

The system states the information it has marked under section 552.111 consists of "[c]ommunications between and among employees and officials of the System, including counsel, and its institutions regarding policy matters." With regard to these communications, the system asserts:

⁶As we make are able to make this determination under section 552.107, we need not address the system's remaining arguments as to the confidentiality of this attorney-client privileged information under sections 552.101 and 552.111.

the responsive documents contain the deliberative process by which individuals recommended review of policy issues. Unfettered written exchanges and dialogues help facilitate the creation of policy decisions which strive to improve the visibility, economic performance, and international prominence of [the system] and its institutions. The ability of employees and officials of [the system], its institutions, and those acting on their behalf, to opine, investigate, explore potential problems, and suggest changes is an invaluable tool that actively promotes constructive checks and balances throughout the [system].

Based upon the system's representations and our review of the information at issue, we find most of the remaining information the system marked under section 552.111 consists of deliberations regarding system policy matters. Accordingly, we conclude this information falls under the deliberative process privilege and is therefore excepted from disclosure under section 552.111. We have marked this information. However, we find that the remaining information the system seeks to withhold under section 552.111 consists of general administrative and purely factual information that does not relate to deliberations concerning policy, and thus, does not fall under this exception.

The system also argues a portion of the remaining information is confidential under section 552.101 of the Government Code. Section 552.101 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 other statutes make confidential, such as section 51.971 of the Education Code, which provides as follows:

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

(1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]

Educ. Code § 51.971(e)(1). Section 51.971 defines a compliance program as a process to assess and ensure compliance by officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies. *Id.* § 51.971(a)(1).

The system informs this office that a portion of the remaining information at issue pertains to an ongoing compliance investigation. The system states the investigation is being conducted by the system's Office of General Counsel. The system further states the purpose of the review is to assess and ultimately ensure that the system has complied with all applicable laws, rules, regulations, and policies. The system also represents that release of the information at this time would interfere with, and potentially compromise, that investigation. Based on the system's representations and our review, we agree the

information we have marked pertains to the system's compliance program for purposes of this statute. *See id.* § 51.971(a). Accordingly, we conclude this information is made confidential under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code.⁷

Having concluded the attorney-client and deliberative process privileges apply to some of the information under sections 552.107 and 552.111 respectively, and that section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code applies to the information we have marked under this statutory provision, we must now determine whether sections 552.101, 552.107, and 552.111 make information confidential for purposes of a confidentiality agreement signed under section 552.008(b) of the Government Code.

In *Texas Commission on Environmental Quality v. Abbott*, 311 S.W. 3d 663 (Tex. App.—Austin 2010, pet. denied), the Third Court of Appeals construed the term “confidential information” as used in section 552.008(b). In that case, a legislator requested confidential information from the Texas Commission on Environmental Quality (“TCEQ”) pursuant to the special right of access afforded to legislators under section 552.008. The TCEQ sought to avoid providing the information in question to the legislator. This office ruled that section 552.008 compelled TCEQ to provide the information subject to a confidentiality agreement, and TCEQ challenged our ruling in a state district court. TCEQ argued the phrase “including confidential information” in subsection 552.008(b) operated to exclude documents protected by the attorney-client privilege from legislators’ special right of access under section 552.008. The district court rejected TCEQ’s claim and agreed with this office’s determination that TCEQ was required to produce the information subject to a confidentiality agreement. On appeal, the Third Court of Appeals ruled “[t]he plain meaning of this phrase [confidential information] includes documents subject to the attorney-client or work-product privileges. Such documents would also constitute information that is ‘excepted from required disclosure’ or ‘confidential under other law.’” *Id.* at 670. After dismissing TCEQ’s separation of powers argument, the court concluded section 552.008 required TCEQ to disclose the documents at issue. In so ruling, however, the court additionally stated:

[w]e further observe that subsection 552.008(b) protects the confidentiality of [TCEQ’s] documents once they are disclosed pursuant to a legislative request for information. [Citation omitted]. Subsection 552.008(b) preserves the confidentiality of [TCEQ’s] documents while in the possession of Senator Shapleigh by authorizing [TCEQ] to require Senator Shapleigh to sign a confidentiality agreement prior to receiving the documents at issue

⁷As we are able to make this determination with regard to the information we have marked under section 51.971 of the Education Code, we need not address the system’s remaining argument as to the confidentiality of this information.

These protections make clear that the legislature intended to give its members and committees a right of access even to confidential information.

Id. at 675. Thus, the Third Court of Appeals determined that information protected by the attorney-client privilege, as well as information “excepted from required disclosure” and “confidential under other law,” constituted confidential information for purposes of section 552.008 of the Government Code. The court further concluded that the execution of a confidentiality agreement by a legislative requestor preserved the confidentiality of information provided to legislators under section 552.008(b).

Therefore, in accordance with the court’s ruling in *Texas Commission on Environmental Quality v. Abbott*, the information that we conclude falls under section 552.101 of the Government Code in conjunction with section 51.971(e)(1) of the Education Code, or sections 552.107 and 552.111 of the Government Code, is deemed confidential for purposes of section 552.008(b) of the Government Code as information that is excepted from required disclosure or confidential under other law. Thus, your office must maintain the confidentiality of the information we have marked under the respective exceptions, in accordance with the confidentiality agreement you executed pursuant to section 552.008(b). The remaining information the system marked as confidential, but that we conclude does not fall within section 552.111, is not required to be maintained as confidential by your office. Should either you or the system disagree with our decision in this matter, section 552.008(b-2) authorizes either party to appeal this open records letter ruling to a Travis County district court. *See* Gov’t Code § 552.008(b-2).

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/tch

Ref: ID# 489395

Enc. Submitted documents

c: Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902
(w/enclosures)