



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2013

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

Dear Ms. Chatterjee:

OR2013-10401

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# 489195 (OGC # 148947).

The University of Texas System (the "system") received a request for the following: (1) correspondence between a system official and a named legislator; (2) requests to the system by members of the Texas Legislature for information and the materials responsive to those requests; (3) the personnel file of a former employee; and (4) all documents and reports, including correspondence between members and information requests made of academic institutions generated by the Audit, Compliance, and Management Review Committee.¹ You state the system is releasing information responsive to categories (1), (2), and (3) of the request and some of the information responsive to category (4) of the request. You state the system will redact e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records

¹We note the city asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Decision No. 684 (2009).² You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.1235, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2013-06653 (2013) and 2013-06993 (2013). In Open Records Letter No. 2013-06653, we concluded the system may withhold certain marked information under sections 552.107 and 552.111 of the Government Code. In Open Records Letter No. 2013-06993, we concluded the system may withhold certain information under sections 552.107, 552.111, and 552.116 of the Government Code. We have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2013-06653 and 2013-06993 were based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the system may continue to rely on Open Records Letter Nos. 2013-06653 and 2013-06993 as previous determinations and withhold or release the identical information in accordance with those rulings. *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). To the extent the requested information is not encompassed by the previous rulings, we will address the submitted arguments.

Next, we note you have marked portions of the submitted information as not responsive to the instant request. The system need not release nonresponsive information in response to this request, and this ruling will not address that information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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.

³We 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 that those records contain substantially different types of information than that submitted to this office.

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 to only 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 to only 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 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 the information you have marked constitutes communications between system attorneys, system employees, system officials, and outside counsel for the system that were made for the purpose of facilitating the rendition of professional legal services to the system. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the system may withhold the responsive information you have marked under section 552.107(1) of the Government Code.⁴

You raise section 552.111 of the Government Code for portions of the remaining responsive information. 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 section 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.

⁴As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

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).

This office has also concluded 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). 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 you have marked consists of communications among system employees and system officials pertaining to policy matters of the system. You also state a portion of the remaining information is a draft document that will be released in its final form. Based on your representations and our review of the information at issue, we conclude the system may withhold the information we have marked under section 552.111 of the Government Code.⁵ However, the remaining information is general administrative or purely factual information. Therefore, we conclude you have failed to demonstrate the remaining

⁵As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the system. Consequently, the system may not withhold any of the remaining information under section 552.111 of the Government Code.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the system may continue to rely on Open Records Letter Nos. 2013-06653 and 2013-06993 as previous determinations and withhold or release the identical information in accordance with those rulings. The system may withhold the information you have marked under section 552.107(1) of the Government Code. The system may withhold the information we have marked under section 552.111 of the Government Code. The remaining responsive 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 489195

Enc. Submitted documents

c: Requestor
(w/o enclosures)