



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2013

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-18526

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# 503484 (OGC# 151428, 151429).

The University of Texas at Austin ("UT-Austin") received two requests for all records created since January 1, 2009, pertaining to meetings and communications between UT-Austin officials and a specified list of individuals.¹ You state UT-Austin will release some information. You state UT-Austin redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.²

¹You state the university sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The 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 consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

You state UT-Austin will redact information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code.³ Further, you state UT-Austin will redact personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Letter No. 684 (2009).⁴ You claim some of the submitted information is not subject to the Act. You also claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.106, 552.111, and 552.1235 of the Government Code. Further, you state, and provide documentation showing you have notified a third party of the request and her right to submit arguments to this office as to why the submitted information should not be released.⁵ *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted representative sample of information.⁶ We have also received and considered the requestor's comments. *Id.*

Initially, you state some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-14911 (2013). As we have no indication the law, facts, or circumstances upon which the prior ruling was based have changed, UT-Austin may continue to rely on Open Records Letter No.2013-14911 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (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 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 submitted information is not identical to the information that was the subject of Open Records Letter No. 2013-14911, we will consider your arguments.

³Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

⁴Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

⁵As of the date of this letter, this office has not received comments from the third party explaining why any of the submitted information should not be released.

⁶We 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.

Next, you assert a portion of the submitted information is not subject to the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002. Thus, virtually all the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.*; *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us some of the information you have marked consists of personal e-mails and personal meeting reminders that have no connection with UT-Austin’s business and constitute incidental use of e-mail by UT-Austin employees. You state UT-Austin’s policy allows for incidental use of e-mail by employees and officials. You further state the use of university resources to create and maintain the marked information was *de minimis*. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review of the information at issue, we agree the information you marked does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for UT-Austin. *See* Gov’t Code § 552.002. Therefore, we conclude the e-mails and meeting reminders you have marked are not subject to the Act and need not be released in response to the present request for information.⁷

⁷As our ruling is dispositive for this information, we do not address your remaining arguments against its release.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

You assert some of the remaining information, which you have marked, “contains communications and draft testimony regarding legislation and other working drafts of legislation that [UT-Austin] prepared in response to legislative inquiries.” Upon review, we find the information you have marked under section 552.106 constitutes advice, opinion, analysis, and recommendations for the purposes of section 552.106. Accordingly, UT-Austin may withhold the information you have marked under section 552.106 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 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.

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.

You seek to withhold some of the remaining information under section 552.111 of the Government Code. You state the information you have marked consists of advice, opinions, and recommendations of employees and officials of UT-Austin and third party individuals with whom UT-Austin shares privity of interest. You further state one of the documents you have marked consists of a draft document that was intended to be released in its final form. Upon review, we find UT-Austin may withhold the draft document we have marked under section 552.111 of the Government Code.⁸ However, we find the remaining information at issue either consists of information that is administrative or purely factual in nature or was communicated with individuals with whom you have not demonstrated UT-Austin shares a privity of interest or common deliberative process. Accordingly, UT-Austin may not

⁸As our ruling is dispositive for this information, we do not address your argument against its release under section 552.1235 of the Government Code.

withhold any portion of the remaining information at issue under section 552.111 of the Government Code.

You seek to withhold identifying information of applicants to UT-Austin contained in some of the remaining information among other information under constitutional privacy. Section 552.101 of the Government Code encompasses the doctrine of constitutional privacy, which protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); see also Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); see also ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); see also ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). You contend the information you have indicated is confidential under constitutional privacy. Upon review, we find some of the information at issue falls within the zones of privacy. Accordingly, UT-Austin must withhold the identifying information of applicants to UT-Austin contained in the information you have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy.⁹ We find you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the UT-Austin may not withhold any of the remaining information you have marked under section 552.101 on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See ORD 455. Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, UT-Austin must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. We find none of the remaining information to be highly intimate or

⁹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

embarrassing and not of legitimate public interest; thus, it may not be withheld under section 552.101 in conjunction with common-law privacy.

In summary, to the extent any of the responsive information is identical to the information previously ruled upon by this office, we conclude UT-Austin may continue to rely on Open Records Letter No. 2013-14911 as a previous determination and withhold or release the identical information in accordance with that ruling. We find the information you have marked under section 552.002 of the Government Code is not subject to the Act and UT-Austin is not required to release it in response to a request for information. UT-Austin may withhold (1) the information you have marked under section 552.106 of the Government Code, and (2) the information we have marked under section 552.111 of the Government Code. UT-Austin must withhold (1) the identifying information of applicants to UT-Austin in the information you have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy, and (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lana L. Freeman
Assistant Attorney General
Open Records Division

LLF/eb6

Ref: ID# 503484

Enc. Submitted documents

c: Requestor
(w/o enclosures)