



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2013

Ms. Lauri Schneidau Ruiz
Assistant General Counsel
Office of the General Counsel
University of Houston System
311 E. Cullen Building
Houston, Texas 77204-2028

OR2013-20008

Dear Ms. Ruiz:

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# 505964.

The University of Houston (the "university") received a request for information pertaining to a specified incident. You state the university has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"),

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

section 1232g of title 20 of the United States Code, does not permit a state educational agency or institution 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.² Consequently, state and local education authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). In this instance, you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted records, other than to note the requestor has a right of access to her own child's education records and her right of access prevails over claims under section 552.101 of the Government Code and the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of such records. The DOE has informed our office, however, the right of access of a parent under FERPA to information about the parent's child does not prevail over an educational institution's right to assert the attorney-client privilege. Accordingly, we will address the applicability of the university's argument under section 552.107 to the submitted information. We will also address the university's claimed exceptions to the extent the requestor does not have a right of access to the submitted information under FERPA.

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 section encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers

²A 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>.

used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

...

(3) the identity of the person who made the report.

Fam. Code § 261.201(a), (k), (l)(3). You contend Exhibit 3 consists of a report of alleged or suspected child abuse and falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code). In this instance, however, the submitted information indicates the requestor is a parent of the child victim listed in the information at issue and is not the individual alleged to have committed the alleged or suspected abuse. *See id.* § 261.201(k). Thus, as you acknowledge, the information at issue may not be withheld from this requestor on the basis of section 261.201(a). *Id.* Section 261.201(l)(3), however, states the identity of the reporting party must be withheld. *Id.* § 261.201(l)(3). Thus, the university must withhold the reporting party’s identity, which we have marked, under section 552.101 in conjunction with section 261.201(l)(3). However, we find none of the remaining information you have marked in Exhibit 3 identifies an individual who made a report of the alleged or suspected abuse; thus, the university may not withhold the remaining information at issue under section 552.101 in conjunction with section 261.201(l)(3).

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 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 Exhibits 4 through 7 consist of communications and notes made between attorneys for the university and university employees that were made for the purpose of providing legal services to the university. You state the communications and notes were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibits 4 through 7 consist of privileged attorney-client communications the university may generally withhold under section 552.107(1).³ We note, however, some of these otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, then the university may not withhold these non-privileged e-mails and attachments under section 552.107(1).

To the extent the non-privileged e-mails we have marked in Exhibit 6 are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, we address your argument under section 552.111 of the Government Code for this information. Section 552.111 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. Section 552.111 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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 id.*

You claim the information at issue in Exhibit 6 pertains to internal deliberations between university attorneys and employees regarding policymaking processes of the university's charter school. However, the remaining information in Exhibit 6 consists of e-mail communications with individuals you have failed to demonstrate share a privity of interest or common deliberative process with the university. Thus, we find you have not demonstrated how the deliberative process privilege applies to this information. Accordingly, the university may not withhold the remaining information in Exhibit 6 under section 552.111.

We note some of the information in Exhibit 3 may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked in Exhibit 3 must be withheld under section 552.117(a)(1). The university may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(1)(3) of the Family Code. The university may withhold Exhibits 4 through 7 under section 552.107(1) of the Government Code; however, the university may not withhold the non-privileged portions of the e-mails and attachments we have marked if they are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear. If the individuals whose information is at issue timely requested confidentiality

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

pursuant to section 552.024 of the Government Code, the information we have marked in Exhibit 3 must be withheld under section 552.117(a)(1) of the Government Code. The university must release the remaining information.⁵

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 505964

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the information being released in this instance includes information that is confidential with respect to the general public. See Fam. Code. § 261.201(k); Gov't Code § 552.137(b). Therefore, if the university receives another request for this information from an individual other than this requestor, the university must again seek a ruling from this office.