



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2013

Ms. Zeena Angadicheril
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-21588

Dear Ms. Angadicheril:

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# 508275 (OGC Nos. 152049, 152090, 152240, 152385, 152421, 152539).

The University of Texas System (the "system") received a request for invoices, payment information, purchase orders, proposals, meeting notes regarding any financial transactions, and communications between the system and sixteen named individuals and entities during the last five years. The system also received five requests from different requestors for the information responsive to the first request. You state the system is releasing most of the requested information to the requestors. You state the system redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ Further, you state the system will redact personal e-mail addresses under section 552.137 of the Government Code in accordance with Open

¹The 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>.

Records Letter No. 684 (2009).² You claim some of the requested information is not subject to the Act. Additionally, you claim some of the requested information is excepted from disclosure under sections 552.106, 552.107, and 552.111 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.³ 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 the submitted arguments and reviewed the submitted representative sample of information.⁴

Initially, you assert a portion of the submitted information is not subject to the Act. The Act is applicable only to "public information." See *id.* §§ 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.

²Open 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.

³As 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.

⁴We 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.

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 that have no connection with the system's business and constitute incidental use of e-mail by system employees. You state the system's policy allows for incidental use of e-mail by employees and officials. You further state the use of system 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 have 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 the system. See Gov't Code § 552.002. Therefore, we conclude the e-mails you have marked are not subject to the Act and need not be released in response to the present request for information.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" *Id.* § 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 state some of the remaining information consists of communications regarding proposed legislation, working drafts of legislation, and inquiries from the legislature seeking input from employees and officials of the system. You state the system employees and officials communicate with members of the legislature as a part of their official job description and responsibilities and are tasked with preparing information and other materials to be considered by legislative bodies. Upon review, we find the information we have marked constitutes advice, opinion, analysis, or recommendation for purposes of section 552.106. Accordingly, the system may withhold the information we have marked

under section 552.106 of the Government Code.⁵ However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the system may not withhold any of the remaining information under section 552.106.

Section 552.107(1) 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 the information you have marked under section 552.107 constitutes communications between system attorneys, officials, employees, and representatives in their capacity as clients that were made for the purpose of providing legal services to the system.

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

You state the communications were intended to be confidential 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 at issue. Thus, the system may generally withhold the information you have marked under section 552.107(1) of the Government Code.⁶ We note, however, one of the e-mail strings at issue includes an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the system separate and apart from the otherwise privileged e-mail string in which it appears, then the system may not withhold the non-privileged e-mail 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. 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,

⁶As our ruling is dispositive, we need not address your remaining argument for this information.

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 the system and third party individuals with whom the system shares a privity of interest. You further state some of the information at issue consists of draft documents that were intended to be released in their final form. Based on your representations and upon our review, we find the information we have marked constitutes policymaking advice, opinion, and recommendation. As such, the system may withhold the information we have marked under section 552.111 on the basis of the deliberative process privilege. However, we find the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate this information is excepted under section 552.111. Accordingly, none of the remaining information may be withheld on this basis.

Section 552.117(a)(1) 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.⁷ Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for 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 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 current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked the personal cellular telephone number of a system employee under section 552.117(a)(1). If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the system must withhold the personal cellular telephone number we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The system may not withhold this information under section 552.117(a)(1) if the employee at issue did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

We have also marked the cellular telephone number of a member of the Texas Senate under section 552.117(a)(1). We note this office has applied the interagency transfer doctrine to conclude information made confidential under section 552.117(a)(1) of the Government Code remains confidential upon transfer to another governmental body. *See* Open Records Decision No. 674 at 4-5 (2001); *see also* Open Records Decision No. 516 (1989) (Department of Public Safety did not violate confidentiality under predecessor of section 552.117(2) by transferring police officer's home address to Attorney General's Child Support Enforcement Office). If the senator timely requested confidentiality under section 552.024 and the cellular telephone service is not paid for by a governmental body, the information at issue in the custody of the senator's office was confidential under section 552.117(a)(1). Pursuant to the intergovernmental transfer doctrine, the information remains confidential upon the transfer of this information to the system. Thus, in order to ascertain whether the personal information of the senator is confidential and cannot lawfully be released to the public, the system must inquire with the senator's office as to whether the individual elected under section 552.024 to keep confidential her personal information and the cellular telephone service is not paid for by a governmental body. If so, then the system

⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

must withhold the information pertaining to that individual, which we have marked, under section 552.117(a)(1) of the Government Code.

In summary, the e-mails you have marked are not subject to the Act and need not be released in response to the present request for information. The system may withhold the information we have marked under section 552.106 of the Government Code. The system may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the marked non-privileged e-mail is maintained by the system separate and apart from the otherwise privileged e-mail string in which it appears, the system may not withhold the non-privileged e-mail 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 system must withhold the system employee's cellular telephone number we have marked under section 552.117(a)(1) if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 and the cellular telephone service is not paid for by a governmental body. The system must withhold the senator's cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if, after inquiring with the senator's office, the system determines the individual timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body. The system must release the remaining information.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 508275

Enc. Submitted documents

c: 6 Requestors
(w/o enclosures)

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