



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2014

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

OR2014-06818

Dear Ms. Vieira:

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# 520606 (O.G.C. Nos. 154224, 154947, 155057, 155258).

The University of Texas System (the "system") received four requests for e-mails from the Board of Regents to a specified individual and all responses by the individual for a specified period of time. You state the system has released some information to the requestors. You also state the system will redact information subject to section 552.117, as permitted by section 552.024(c) of the Government Code.¹ Further, you state the system will redact account numbers under section 552.136 of the Government Code,² as well as personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records

¹Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body. Gov't Code § 552.117. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the official or employee elects not to allow public access to the information. *See id.* § 552.024(c).

²Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Decision No. 684 (2009).³ You claim some of the remaining requested information is not subject to the Act. You also claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.1235 of the Government Code. Additionally, you state, and provide documentation showing, you have notified an interested party of her right to submit comments to this office why some of the submitted information should not be released.⁴ *See* Gov't Code § 552.304 (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.⁵ We have also received and considered comments from one of the requestors. *See id.*

Initially, we note some of the submitted information, which you have marked, is not responsive to the instant requests because it is outside of the scope of the requested information. This ruling does not address the public availability of any information that is not responsive to the requests, and the system is not required to release such information in response to these requests.

Next, you assert some of the submitted information, which you have marked, 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

³Open 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.

⁴As 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.

⁵We 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 those records contain substantially different types of information than that submitted to this office.

(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 the e-mails you have marked consist of personal exchanges maintained by system employees. You state these e-mails have no connection with the system's business and constitute incidental personal use of system resources by system employees. You inform us the system's policy allows for incidental use of official resources by system employees. 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 these representations and our review of the information at issue, we agree the e-mails you have marked do 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 requests for information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 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 established. *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 Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the system may not withhold any of the remaining information on the basis of section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 at issue constitutes or documents a communication. *Id.* at 7. Second, the governmental body must demonstrate the communication was 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *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, 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 the communication has been maintained. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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) (attorney-client privilege extends to entire communication, including facts contained therein).

You claim some of the remaining information is subject to section 552.107(1) of the Government Code. You state this information consists of communications between outside counsel for the system and system attorneys, officials, employees, and representatives in their capacity as clients that were made for the purpose of providing legal services to the system. You further state these communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus,

the system may withhold the information you have marked under section 552.107(1) of the Government Code.⁶

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, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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

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

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 at 9.

You state some of the remaining information consists of advice, opinions, and recommendations of system employees and officials, as well as individuals with whom the system shares a privity of interest. You further state this information relates to policymaking matters. Upon review, we find the system may withhold the information we have marked under section 552.111 of the Government Code. Additionally, you inform us some of the remaining information, which you have marked, consists of draft documents; however, you do not state whether the draft documents were intended to be released to the public in final form. The system may withhold the draft documents you have marked under section 552.111 of the Government Code only if they were intended to be released to the public in their final form. However, we find the remaining information consists of general administrative information or information that is purely factual in nature. Therefore, the system may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.1235 of the Government Code excepts from disclosure “[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). For purposes of this exception, “institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as meaning “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). You state some of the remaining information identifies individuals who made donations to the system. Thus, the system must withhold the donors’ identifying information, which you have marked, pursuant to section 552.1235 of the Government Code.

In summary, some of the submitted e-mails, which you have marked, are not subject to the Act and need not be released in response to the present requests for information. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system may withhold the information you have marked under section 552.107(1) of the Government Code. The system may withhold the marked information under section 552.111 of the Government Code; however, the system may only withhold the marked draft documents if they were intended to be released to the public in their final form. The system must withhold the donors' identifying information you have marked pursuant to section 552.1235 of the Government Code. The system must release the remaining responsive 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,



Miriam A. Khalifa
Assistant Attorney General
Open Records Division

MAK/akg

Ref: ID# 520606

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

Third Party
(w/o enclosures)