



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2014

Ms. Audra Gonzalez Welter
Attorney and Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2014-10243

Dear Ms. Welter:

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# 525886 (OGC# 155331).

The University of Texas at Austin (the "university") received a request for a named university employee's calendars for a specified time period and e-mails between the named university employee and individuals at Genetech, the University of California Office of the President, or the University of California, San Francisco ("UCSF"), for a specified time period. You state the university does not possess information responsive to portions of the request.¹ You state you will release some information to the requestor. You state you will redact information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code.² Further, you state pursuant to the previous

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Section 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). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2).

determination in Open Records Decision No. 684 (2009), you will redact personal e-mail addresses subject to section 552.137 of the Government Code.³ You claim portions of the submitted information are not subject to the Act. In addition, you claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, you assert some of the e-mails you marked are 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 the named individual previously served as a faculty member at UCSF and as an administrator assisting with the

³Open 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, without the necessity of requesting an attorney general decision.

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.

Ernest Gallo Clinic and Research Center ("Gallo Research Center"). You inform us the e-mails you marked consist of personal exchanges, information regarding personal travel, and information related to the named employee's time at UCSF and work with the Gallo Research Center. You assert the information you marked has no connection with the university's business and is an incidental use of e-mail by a university employee. You state the university's policy allows for incidental use of official resources by university employees. 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 most of the e-mails you marked and the additional e-mails we 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 university. See Gov't Code § 552.002. However, we note some of the information at issue pertains to university funded grant projects. Further, we find the remaining information at issue was written, produced, collected, assembled, or maintained in connection with the transaction of official university business by university employees in their official capacities. Thus, the remaining information is subject to the Act. Therefore, with the exception of the information we marked as subject to the Act, we conclude the e-mails you marked and the additional e-mails we marked are not subject to the Act and need not be released in response to the present request for information.⁵

Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses section 51.914 of the Education Code, which provides, in pertinent part:

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914(a)(1)-(2), (b). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has "a potential for being sold, traded, or licensed for a fee." ORD 651 at 9-10. Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* at 10. Thus, this office has stated that in considering whether requested information has "a potential for being sold, traded, or licensed for a fee," we will rely on a governmental body's assertion that the information has this potential. *See id.* However, a governmental body's determination that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.* We note that section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988).

You seek to withhold the information you marked under section 51.914 of the Education Code. You state the university is an institution of higher education for purposes of section 61.003 (5) and (8) of the Education Code. *See* Educ. Code § 61.003(5), (8). You state the information at issue contains the details of research conducted by university employees, including information regarding the findings of the research projects and research protocols. You assert this information contains scientific information as well as procedures and other information that relate to a product, device, or process developed by university employees. You further state the marked information describes experimentation and research that has the potential for being further sold, traded, or licensed for a fee and is therefore

confidential pursuant to section 51.914(a). Additionally, you state the information at issue reveals data or research that is not yet published and may be or has been commercialized. You assert this information is excepted pursuant to section 51.914(b). Based on your representations and our review, we find you have demonstrated the applicability of section 51.914 of the Education Code to most of the information you marked. However, we find you have not demonstrated how the remaining information you marked is subject to section 51.914. Accordingly, the university may not withhold this information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. Accordingly, with the exception of the information we marked for release, the university must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information (1) containing highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information you marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the university must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert section 552.111 of the Government Code for some of the remaining 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 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).

You state the information you marked consists of advice, recommendations, and opinions between and among university employees, university officials and their representatives, and employees of other University of Texas System institutions regarding policy matters. Upon review, we find the university may withhold most of the information you marked under section 552.111 of the Government Code. However, we find some of the information at issue consists of routine administrative information or purely factual information. You have failed to establish this information constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the university. Accordingly, the university may not withhold that information, which we have marked for release, under section 552.111 of the Government Code. Therefore, with the exception of the information we marked for release, the university may withhold the information it marked under section 552.111 of the Government Code.

In summary, with the exception of the information we marked for release, the university must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code and the information the university marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the information we marked for release, the university may withhold the information you marked under section 552.111 of the Government Code. The university must release the remaining information that is subject to the Act.

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,

A handwritten signature in black ink, appearing to read "Paige Thompson". The signature is written in a cursive style with a large initial "P".

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 525886

Enc. Submitted documents

c: Requestor
(w/o enclosures)