



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2014

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

OR2014-12992

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# 530710 (OGC# 155097).

The University of Texas System (the "system") received a request for three categories of information pertaining to Deloitte & Touche LLP ("Deloitte"), including communications between named individuals.¹ You state the system will release some information to the requestor. We understand the system will redact information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code.² You claim portions of the submitted information are not public information under the Act. You also claim portions of the submitted information are excepted from disclosure under

¹You inform us the system 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). You also inform us the system sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us in response to the cost estimate, the requestor narrowed the scope of one of the requested categories of information. *See id.* § 552.2615, 552.263.

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).

sections 552.101, 552.107, 552.111, and 552.139 of the Government Code.³ We have considered your arguments and reviewed the submitted information, portions of which consist of representative samples.⁴

Initially, you assert the University of Texas Electronic Identification Numbers (“UTEIDs”) contained in the submitted information are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You inform our office that when combined with an individual’s password, the UTEIDs serve as “the required log on protocol to access the computer mainframe, the [s]ystem’s centralized hub that runs all its high-level electronic functions.” You indicate the UTEIDs are used solely to access the system’s computer mainframe and that the UTEIDs have no other significance other than their use as tools for the maintenance, manipulation, or protection of public information. Based on your representations and our review, we find the UTEIDs contained in the submitted information do not constitute public information under section 552.002 of the Government Code. Therefore, we conclude the UTEIDs are not subject to the Act and need not be released to the requestor.

Next, we note you have marked some of the submitted information as not responsive to the instant request. We note some of the information you marked consists of a communication between the named individuals. Upon review, we find this information, which we marked, is responsive to the present request. We agree the remaining information you marked is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the system is not required to release such information in response to this request.

Section 552.139 provides in pertinent part:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

³Although you do not raise section 552.101 of the Government Code in your brief, we understand you to claim this exception based on your markings in the submitted information.

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.

(b) The following information is confidential:

- (1) a computer network vulnerability report; [and]
- (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state the system contracted with Deloitte to implement and develop a software that provides a risk management development plan for the system's security systems. You further state this software assesses risks of the system's information security systems. You inform us the information at issue, which you marked, discusses these risk assessments. You assert if the information at issue was released it would allow someone to know the system's concerns related to the system's network security, how the system ranks these concerns, and where the system's risk assessment findings are located within the system's network. You explain the information you marked under section 552.139 highlights the vulnerabilities and security gaps in network security, the release of which would make the computer networks and programs of the system and its component institutions vulnerable to attack. Based on your arguments and our review of the information at issue, we find the system must withhold the information we marked under section 552.139 of the Government Code. However, we find you have not demonstrated how any of the remaining responsive

information relates to computer network security, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Further, we find you have failed to explain how any of the remaining responsive information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the system may not withhold any of the remaining responsive information under section 552.139 of the Government Code.

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 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 demonstrated. *See 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 marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing information of no legitimate public interest, and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *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). 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, *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. *See 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 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 marked consists of a communication between a system attorney and system employees and officials. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the system. You further state this communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked. Thus, the system may withhold the information you marked under section 552.107(1) of the Government Code.

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

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order 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 the information you marked consists of advice, recommendations, and opinion of system employees and employees of Deloitte, with whom the system shares a privity of interest. You further state this information relates to policymaking matters regarding the risk assessments at issue. Upon review, we find the system may withhold the information you marked under section 552.111 of the Government Code.

In summary, the system must withhold the information we marked under section 552.139 of the Government Code and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system may withhold the information you marked under sections 552.107 and 552.111 of the Government Code. The system must release the remaining responsive information.

You have asked this office to issue a previous determination to the system finding UTEIDs are not subject to the Act without the necessity of requesting a decision from this office. *See id.* § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). After due consideration, we have decided to grant your request. Therefore, this letter ruling shall serve as a previous determination for the system under section 552.301(a) that UTEIDs do not constitute public

information under the Act, and need not be released in response to a request for information under the Act made to the system. *See* Gov't Code § 552.011 (stating “[t]he attorney general shall maintain uniformity in the application, operation, and interpretation” of the Act, and may “prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on” the Act). Therefore, so long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the system need not ask for a decision from this office with respect to this type of information. *See* ORD 673 at 7.

You also ask this office to issue a previous determination on behalf of the system's institutions finding UTEIDs are not subject to the Act without the necessity of requesting a decision from this office. We note the system and its institutions are separate governmental bodies. As the request at issue was received by the system, we decline to issue a previous determination to a governmental body that did not receive the request for information.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 530710

Enc. Submitted documents

c: Requestor
(w/o enclosures)