



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 16, 2016

Ms. Jessica Vu
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-18451

Dear Ms. Vu:

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# 621316 (OOG ID# 16-138).

The Office of the Governor (the "governor's office") received a request for all e-mail correspondence between the governor's office and any e-mail addresses with specified domains during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of the University of Texas at Austin (the "university"), the University of Texas System (the "system"), the University of Texas Health and Science Center at Houston, and the University of Texas Health and Science Center at San Antonio. Accordingly, you state you notified the third parties of the request for information pursuant to section 552.304 of the Government Code. *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.¹ We have received comments from the system on behalf of the university.

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.*

¹We 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.

§ 552.101. This section encompasses information protected by other statutes, including section 62.167 of the Education Code and section 490.105 of the Government Code, which each provide for the confidentiality of certain information pertaining to an individual or entity that was considered for or received an award from the fund. The Eighty-fourth Texas Legislature adopted the three following bills, which enacted section 62.167 of the Education Code and section 490.105 of the Government Code: Senate Bill 632, House Bill 7, and House Bill 26.2 See Act of June 1, 2015, 84th Leg., R.S., ch. 323, § 1, 2015 Tex. Sess. Law Serv. 1468 (Vernon) (codified at Educ. Code § 62.167) (Senate Bill 632); Act of June 1, 2015, 84th Leg., R.S., ch. 448, § 17, 2015 Tex. Sess. Law Serv. 1740 (Vernon) (codified at Gov't Code § 490.105) (House Bill 7); Act of June 1, 2015, 84th Leg., R.S., ch. 915, § 1.01, 2015 Tex. Sess. Law Serv. 3164 (Vernon) (codified at Educ. Code § 62.167) (House Bill 26). Because the amendments of the three bills at issue contain substantially the same language regarding the confidentiality of certain information, we find they do not conflict, and will address the confidentiality of the information at issue under both section 62.167 of the Education Code and section 490.105 of the Government Code. Section 62.167 of the Education Code provides:

(a) Except as provided by Subsection (b), information collected under former provisions of Chapter 490, Government Code, concerning the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an individual or entity that was considered for or received an award from the Texas emerging technology fund (the “fund”) is confidential unless the individual or entity consents to disclosure of the information.

(b) The following information collected in connection with [the fund] is public information and may be disclosed under [the Act]:

(1) the name and address of an individual or entity that received an award from that fund;

(2) the amount of funding received by an award recipient;

(3) a brief description of the project funded under former provisions of Chapter 490, Government Code;

(4) if applicable, a brief description of the equity position that the governor, on behalf of the state, has taken in an entity that has received an award from that fund; and

(5) any other information with the consent of:

(A) the governor;

(B) the lieutenant governor;

(C) the speaker of the house of representatives; and

(D) the individual or entity that received an award from that fund, if the information relates to that individual or entity.

Educ. Code § 62.167. In addition, section 490.105 of the Government Code provides:

(a) Except as provided by Subsection (b), information concerning the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an individual or entity that was considered for or received an award from [the fund] is confidential unless the individual or entity consents to disclosure of the information.

(b) The following information collected in connection with [the fund] is public information and may be disclosed under [the Act]:

(1) the name and address of an individual or entity that received an award from that fund;

(2) the amount of funding received by an award recipient;

(3) a brief description of the project funded by the award;

(4) if applicable, a brief description of the equity position that the governor, on behalf of the state, has taken in an entity that has received an award from that fund; and

(5) any other information with the consent of:

(A) the governor;

(B) the lieutenant governor;

(C) the speaker of the house of representatives; and

(D) the individual or entity that received an award from the fund, if the information relates to that individual or entity.

Gov't Code § 490.105. You state the information you marked was collected by the governor's office pursuant to the administration of the fund. You further state the information concerns the identity, background, finance, and marketing plans of an entity that received a fund award and, therefore, is confidential under section 62.167(a) of the Education Code and section 490.105(a) of the Government Code and must be withheld from release pursuant to section 552.101 of the Government Code. You explain the entity has not consented to release of its information. Further, you state the information you marked is not subject to section 62.167(b) of the Education Code or section 490.105(b) of the Government Code. Based upon your representations and our review, we conclude the information you marked concerns the identity, background, finance, and marketing plans of an entity that received a fund award. Therefore, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 62.167(a) of the Education Code and section 490.105(a) of the Government Code.²

Section 552.107(1) of the Government Code protects information coming 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. 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 "to facilitate 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 marked in the remaining information consists of communications between governor's office attorneys and governor's office employees made for the purpose of facilitating the rendition of legal services. You also state these communications were intended to be confidential and that the confidentiality has been maintained. Upon review, we find the governor's office has demonstrated the applicability of the attorney-client privilege to the remaining information at issue. Thus, the governor's office may withhold the information you marked in the remaining information 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. 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*, 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. *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).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see 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).

You seek to withhold the information you marked under section 552.111 of the Government Code. You state the information at issue consists of advice, opinions, and recommendations of employees and officials of the governor's office regarding policymaking matters. Upon review, we find the governor's office may withhold the information you have marked under section 552.111 of the Government Code.

The governor's office and the university seek to withhold some of the remaining information under section 552.101 of the Government Code in conjunction with section 62.165 of the Education Code and section 190.29 of title 10 of the Texas Administrative Code.³ Section 62.165 states:

Information collected or obtained by the office or the advisory board concerning the identity of a particular distinguished researcher who is the subject of a grant proposal under [the Governor's University Research Initiative ("GURI")] is confidential unless the researcher and the applicant eligible institution consent to disclosure of the information. The information remains confidential until the date, if any, on which the researcher enters into an employment relationship with the recruiting institution as contemplated in the grant proposal.

Educ. Code § 62.165.⁴ In addition, under the authority of section 62.162 of the Education Code, the office promulgated section 190.29 of title 10 of the Texas Administrative Code, which provides:

In accordance with §62.165 of the Education Code, information collected or obtained by the [governor's office] or the advisory board concerning the identity of a particular distinguished researcher who is the subject of a grant application is confidential and may not be disclosed to the public unless the researcher and the applicant consent to disclosure of the information. The information remains confidential until the date, if any, on which the researcher enters into an employment relationship with the applicant as proposed in the grant application.

10 T.A.C. § 190.29. Thus, section 62.165 of the Education Code and section 190.29 of title 10 of the Texas Administrative Code make confidential information concerning the

³The system briefs on behalf of the university.

⁴Act of June 1, 2015, 84th Leg., R.S., ch. 448, § 11 (codified at Educ. Code § 62.165). We note the legislature also enacted Act of June 1, 2015, 84th Leg., R.S., ch. 323, § 1, also codified at Educ. Code § 62.165.

identity of a GURI researcher unless the researcher and recruiting university consent to the disclosure of the information. *See* Educ. Code § 62.161(1), (8) (defining “advisory board” as GURI advisory board and “office” as Texas Economic Development and Tourism Office within governor’s office for purposes of subchapter H, chapter 62 of the Education Code); *see also* 10 T.A.C. § 190.1(3), (14) (defining “advisory board” as GURI advisory board and “office” as Texas Economic Development and Tourism Office within governor’s office for purposes of chapter 10 of the Texas Administrative Code). The university explains GURI is a program by which the governor’s office provides a matching grant award to eligible higher education institutions for the recruitment of distinguished researchers. The university states the information at issue “consists of information collected or obtained by the [advisory board] and all concerns the identity of a distinguished researcher who is the subject of [a] GURI grant proposal.” The university states negotiations with the researcher at issue are ongoing and the researcher and the applicant at issue have not entered into an employment relationship. The governor’s office and the university also state the researcher and the applicant have not consented to the disclosure of the information at issue. Upon review, we find the information the governor’s office marked consists of information collected or obtained by the office or the advisory board concerning the identity of a particular distinguished researcher who is the subject of a grant proposal under this initiative. Thus, the marked information is confidential under section 62.165 of the Education Code and section 190.29 of title 10 of the Texas Administrative Code, and the governor’s office must withhold it under section 552.101 of the Government Code. However, we find the university has failed to demonstrate the remaining information consists of information collected or obtained by the office or the advisory board concerning the identity of a particular distinguished researcher. Accordingly, the remaining information is not confidential under section 62.165 of the Education Code and section 190.29 of title 10 of the Texas Administrative Code. Thus, the governor’s office may not withhold it under section 552.101 of the Government Code on that basis.

In summary, the governor’s office may withhold the information it marked under section 62.167 of the Education Code and section 490.105 of the Government Code. The governor’s office also may withhold the information it marked under sections 552.107(1) and 552.111 of the Government Code. The governor’s office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 62.165 of the Education Code and section 190.29 of title 10 of the Texas Administrative Code. The governor’s office 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,

Handwritten signature of Ashley Crutchfield in cursive.

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 621316

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)