



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 1, 2015

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

OR2015-20564

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# 579545 (OGC#162314).

The University of Texas System (the "system") received two requests from the same requestor for written correspondence between specified individuals containing specified terms for specified time periods.<sup>1</sup> You state the system will release some information. You state the system will redact some information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> We understand, pursuant to the previous determination in Open Records Decision No. 684 (2009), the system will redact personal e-mail addresses subject

---

<sup>1</sup>We note the system sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

to section 552.137 of the Government Code.<sup>3</sup> You argue some of the submitted information is not subject to the Act. Further, you claim some of the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, 552.108, 552.111, 552.117, and 552.1235 of the Government Code.<sup>4</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>5</sup>

Initially, we address your assertion portions of the responsive information 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 information you marked consists of e-mails that are entirely personal in nature, have no connection with the system’s business, and constitute incidental use of the system’s resources. You state the system allows for incidental use of such resources by employees and officials. You further

---

<sup>3</sup>Open 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.

<sup>4</sup>Although you do not raise section 552.117 of the Government Code in your brief, we understand you to claim this exception based on your markings in the submitted information.

<sup>5</sup>We 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.

state the use of the system's 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 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 marked are not subject to the Act and need not be released in response to the present requests for information.

You state some of the remaining information pertains to applicants of the system's universities. Section 552.114(b) of the Government Code provides,

Information is confidential and excepted from the requirements of [the Act] if it is information in a student record at an educational institution funded wholly or partly by state revenue. This subsection does not prohibit the disclosure or provision of information included in an education record if the disclosure or provision is authorized by 20 U.S.C. [s]ection 1232g or other federal law.

See Act of May 29, 2015, 84th Leg., R.S., ch. 828, § 1, 2015 Tex. Sess. Law Serv. 2479, 2479 (Vernon) (to be codified as an amendment to Gov't Code § 552.114(b)).<sup>6</sup> Section 552.114(a) defines a student record to include "information in a record of an applicant for admission to an educational institution[.]" See Act of May 29, 2015, 84th Leg., R.S., ch. 828, § 1, 2015 Tex. Sess. Law Serv. 2479, 2479 (Vernon) (to be codified as an amendment to Gov't Code § 552.114(a)). We understand the system's universities are educational institutions funded wholly or partly by state revenue. The information at issue pertains to applicants of the system's universities. Thus, we find the information we marked is information in a student record for section 552.114 purposes. Accordingly, we find the system must withhold the information we marked under section 552.114(b) of the Government Code.<sup>7</sup>

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

---

<sup>6</sup>The 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).

<sup>7</sup>As our ruling is dispositive, we need not address your argument against disclosure of this information. We note section 552.114(d) of the Government Code authorizes a governmental body to redact information covered under section 552.114(b) of the Government Code without requesting a decision from this office under the Act. See Act of May 29, 2015, 84th Leg., R.S., ch. 828, § 1, 2015 Tex. Sess. Law Serv. 2479, 2479 (Vernon) (to be codified at Gov't Code § 552.114(d)).

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 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 consists of communications between employees and representatives of the system and its institutions and attorneys or representatives of the attorneys for the system and its institutions. You state these communications were made in furtherance of the rendition of professional legal services to the system. You state these communications were kept confidential and have not been disclosed to third parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked. Accordingly, the system may withhold the information you marked under section 552.107(1) of the Government Code.<sup>8</sup>

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

---

<sup>8</sup>As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

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 that are 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).

This office has also concluded a preliminary draft of a document that is 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.

You state the information you marked contains the deliberative process by which system and system institution employees discussed matters regarding proposed legislation pertaining to campus carry and open carry. You also state the information at issue includes draft documents that were intended for release in their final forms. Thus, you state the information at issue consists of advice, opinions, and recommendations of the system regarding policy

matters. Based on your representations and our review of the information at issue, we find the system has demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the system. Thus, the system may withhold the information you marked under section 552.111 of the Government Code.<sup>9</sup>

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Tex. App.—Austin 2002, no pet.) (Gov’t Code 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the information at issue is maintained by the system’s Office of the Director of Police, a law enforcement agency. You claim release of the information at issue would interfere with law enforcement and compromise the ability of the system and its institutions to secure its offices and campuses. You assert release of the information at issue would compromise the ability to protect the safety and welfare of the individuals at system institutions. You further assert the information at issue relates to specific needs of institution police departments that may be impacted by legislation. Having considered your arguments and reviewed the information at issue, we find you have failed to demonstrate release of the information at issue would interfere with law enforcement. Thus, no portion of the remaining information may be withheld under section 552.108(b)(1).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See 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)* (section 552.117 not applicable to

---

<sup>9</sup>As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the information you marked, and the additional information we marked, under section 552.117(a)(1) of the Government Code; however, the system may only withhold the cellular telephone numbers at issue if the services are not paid for by a governmental body. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the system may not withhold the marked information under section 552.117(a)(1).

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 the information you have marked identifies donors. Thus, the system must withhold the donors' identifying information, which you have marked, under section 552.1235 of the Government Code.

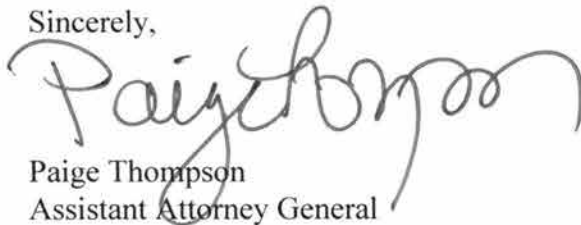
You inform us some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the e-mails you 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 marked under section 552.114(b) of the Government Code. The system may withhold the information it marked under sections 552.107(1) and 552.111 of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the information it marked, and the additional information we marked, under section 552.117(a)(1) of the Government Code; however, the system may only withhold the cellular telephone numbers at issue if the services are not paid for by a governmental body. The system must withhold the donors' identifying information, which you have marked, under section 552.1235 of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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](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# 579545

Enc. Submitted documents

c: Requestor  
(w/o enclosures)