



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 26, 2017

Mr. R. Brooks Moore
Deputy General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2017-24461

Dear Mr. Moore:

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# 681691 (R001459-081017).

The Texas A&M University System (the "system") received a request for all correspondence sent to, received from, or relating to the system's chancellor and eleven named system officials during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.111, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have marked a portion of the submitted information as being not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the system need not release non-responsive information to the requestor.

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

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 51.951 of the Education Code. Section 51.951 provides in part:

(a) Information related to the location, purchase price, or sale price of real property purchased or sold by or for an institution of higher education, as defined by Section 61.003 [of the Education Code], is confidential and exempt from disclosure under Chapter 552, Government Code, until a deed for the property is executed. Information that is confidential and exempted from disclosure under this subsection includes an appraisal, completed report, evaluation, investigation conducted for the purpose of locating or determining the purchase or sale price of the property, or any report prepared in anticipation of purchasing or selling real property.

Educ. Code § 51.951. You state the system is an institution of higher education under section 61.003 of the Education Code. You state the information you have marked reveals the location of real property the system is in the process of purchasing. You explain the purchase has not yet closed and no deed has been executed. Based on your representations and our review, we agree the system must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.951 of the Education Code.

Section 552.101 of the Government Code also encompasses section 51.971 of the Education Code, which provides, in relevant part, the following:

(a) In this section:

(1) “Compliance program” means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

(2) “Institution of higher education” has the meaning assigned by Section 61.003.

...

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

...

(2) by a systemwide compliance office for the purpose of reviewing compliance processes at a component institution of higher education of a university system.

Id. § 51.971(a), (e)(2). As previously noted, you state the system is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You state the information you have marked Exhibit B-6 concerns a review of compliance processes at two system universities. You state the review was conducted by the system's Internal Audit Department. You explain this review was conducted to assess institutional compliance with all applicable laws, rules, regulations, and policies. Based on your representations and our review, we conclude Exhibit B-6 is confidential under section 51.971(e)(2) of the Education Code, and the system must withhold it under section 552.101 of the Government Code on that basis.²

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You state the system has specific marketplace interests in the information you have marked because the system is a competitor with other institutions in a pending search to hire the senior administrator at issue. You also state the hiring has not been finalized, with employment terms being negotiated with a finalist. You assert release of the information at issue would negatively impact the system's ability to hire this individual, as it would enable competing universities to counter the system's proposal. After review of the information at issue and consideration of the arguments, we find you have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information you have marked under section 552.104(a) of the Government Code.

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

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

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 Exhibit B-4 consists of communications between system attorneys and the system officials and employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the system. You state the information at issue was intended to, and has remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B-4. Accordingly, the system may withhold Exhibit B-4 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 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).

You state the information you have marked consists of communications relating to “potential changes to admissions policies at certain [system] universities[.]” Thus, you assert the information at issue consists of advice, opinions, and recommendations of the system pertaining to its policymaking functions. Based on your representations and our review, we find you have demonstrated portions of the information at issue consist of advice, opinions, or recommendations on the policymaking matters of the system. Accordingly, the system may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to show the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the system. Accordingly, the system may not withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, the system: (1) must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.951 of the Education Code; (2) must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(2) of the Education

Code; (3) may withhold the information you have marked under section 552.104(a) of the Government Code; (4) may withhold Exhibit B-4 under section 552.107(1) of the Government Code; (5) may withhold the information we have marked under section 552.111 of the Government Code; and (6) 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,

A handwritten signature in black ink, appearing to read 'Tim Neal', written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/tdw

Ref: ID# 681691

Enc. Submitted documents

c: Requestor
(w/o enclosures)