



Office of General Counsel

## THE TEXAS A&M UNIVERSITY SYSTEM

January 30, 2024

Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

**via OAG E-Filing**

Re: Request for a Decision regarding a Public Information Request from Robert Montoya to the System Offices of The Texas A&M University System (J000079-010824)

Dear Open Records Division:

On January 23, 2024, we requested a decision on an open records request Robert Montoya submitted to the System Offices of The Texas A&M University System (the “system”) on January 8, 2024.<sup>1</sup> The request, enclosed as Exhibit A, seeks certain communications.

We believe that a portion of the information responsive to the request is excepted from disclosure under the Texas Public Information Act, Government Code, Chapter 552 (“Act”), as explained below. Therefore, we are requesting a decision regarding this information.

### **Tex. Gov’t Code § 552.107, Tex. R. Evid. 503**

The representative sample of information enclosed as Exhibit B-1 constitutes or documents a communication between a Texas A&M System attorney and system officials and administrators, and this communication should be excepted from disclosure under section 552.107(1) of the Act and/or Tex. R. Evid. 503 (to the extent that any information covered by Exhibit B is subject to section 552.022 of the Act). The attorney general has provided the following analysis of this exception:

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

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<sup>1</sup> The request was originally received on January 8, 2024. See Exhibit A. The system requested clarification/ narrowing of the request on January 8, 2024, and the requestor provided clarification/narrowing on the same day. The system was closed for Martin Luther King, Jr. Day on January 15, 2024, by order of the A&M System Board of Regents. See Tex. Gov’t Code § 552.0031(d); 662.011(a). Thus, the 10th business day after receipt of this request was January 23, 2024, and the 15<sup>th</sup> business days following receipt of the request is January 30, 2024.

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). 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).

*See, e.g.*, Tex. Att’y Gen. OR2016-02974 (2016). These same factors apply to the application of the attorney-client privilege under Tex. R. Evid. 503. *See* Tex. Att’y Gen. No. ORD-676 (2002).

We submit the information that meets the criteria set forth above to demonstrate the elements of the attorney–client privilege necessary to withhold this information in its entirety. First, the information constitutes or documents a communication, satisfying the first element of the privilege test. The communication or documented communication in Exhibit B-1 is between a Texas A&M System Office of General Counsel (OGC) attorney and system officials and administrators. Specifically, the communication in Exhibit B-1 is between: Ray Bonilla, General Counsel, OGC; Regent John Bellinger, Texas A&M System Board of Regents; Chancellor John Sharp, System. *See* Exhibit B-1. Several other Texas A&M System officials and administrators are copied on the communication: Chairman Bill Mahomes, Texas A&M System Board of

Regents; Joe Elabd, Vice Chancellor for Research and Interim Vice Chancellor for Engineering, System; and Billy Hamilton, Deputy Chancellor and Chief Financial Officer, System. A final communication in the email chain is between several members of the Texas A&M System Board of Regents: John Bellinger; David Baggett; and Sam Torn.

Second, the communication or documented communication was sent and received expressly for the purpose of facilitating the rendition of legal advice or legal services from an OGC attorney to system officials and administrators. Third, the communication is between an OGC attorney and system officials and administrators, and the attorney-client privilege expressly covers communications between a client or the client's representatives and the client's lawyer or the lawyer's representatives. *See* Tex. R. Evid. 503(b)(1)(A). Finally, at the time this information was communicated, it was the intent of the parties that the information not be disclosed to third persons. Subsequent to the initial communication of the information, the attorney and client representatives have maintained the confidentiality of the communication. Therefore, we believe that the representative sample of responsive information, enclosed in Exhibit B-1, is excepted from disclosure under section 552.107(1) of the Act and/or Tex. R. Evid. 503.

### **Tex. Gov't Code § 552.111**

Section 552.111 of the Act, which excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available to a party in litigation with the agency,” has been interpreted to encompass the deliberative process privilege as well as attorney work product privilege. According to your office, pre-decisional internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policymaking processes are subject to section 552.111. Also, policy-making drafts and related interagency communications are covered by this privilege.

For example, the Office of the Attorney General discussed the application of this exception as follows:

Section 552.111 of the Government Code excepts from disclosure “an interagency or interagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, orig. proceeding); 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, orig.

proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations, 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 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.

*See, e.g.,* Tex. Att'y Gen. OR2016-02974 (2016).

We assert that the marked information in the representative sample enclosed as Exhibit B-2 should be withheld under the deliberative process privilege component of section 552.111 of the Act. The enclosed information relates to policymaking, because it pertains to a review of the Texas A&M System's governance and structure. The marked information in Exhibit B-2 reflects advice, opinions, and recommendations of system officials and administrators on this review. Also, the marked information in Exhibit B-2 is a preliminary draft of a policymaking document that will be released to the public in its final form. Therefore, we believe that the marked information enclosed as Exhibit B-2 is excepted from disclosure under section 552.111 of the Act.

January 30, 2024

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Thank you for your consideration of this matter. If you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Brooks Moore', written over a horizontal line.

R. Brooks Moore  
Deputy General Counsel

Enclosures: Exhibits A, B-1, B-2

cc: Requestor *(via email) (no attachments)*