



TEXAS TECH UNIVERSITY SYSTEM

Office of General Counsel

February 8, 2018

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

The Honorable Ken Paxton
Attorney General of the State of Texas
Open Records Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

RE: Texas Public Information Act Request
January 18, 2018 Request
Requestor: Wayne Dolcefino-Dolcefino Consulting

Dear General Paxton:

Pursuant to the Texas Public Information Act, on February 1, 2018, Texas Tech University ("TTU") mailed you a request for an Open Records Decision ("ORD") regarding exceptions to public disclosure of the information requested. As of this date, your office has not assigned an identification number to this request.

As stated in our February 1st correspondence (attached as Attachment "A"), TTU received a request from Wayne Dolcefino with Dolcefino Consulting (the "Requestor") on January 18, 2018. The request was for PDF Copies of all emails between Kent Hance and Jodey Arrington between September 1, 2009 and March 1, 2010 related to Mike Leach, and/or "M/L" and/or any investigation regarding Adam James. TTU enclosed copies of the request in Exhibit "A" and copies of TTU's response to the Requestor in Exhibit "B" of our February 1st request for an Open Records Decision. The date of receipt is evidenced by the date on the email header of the request contained in Exhibit "A."

In calculating the 15th business day after receipt of Requestor's letter, the deadline for Texas Tech University ("TTU") to submit its specific comments and reasons for exceptions to public disclosure, along with relevant documents, is February 8, 2018. *See* Tex. Gov't Code § 552.301(e).

As indicated in TTU's February 1st correspondence, this letter, delivered under separate cover, includes specific comments explaining why the documents related to the above-mentioned request are excepted from public disclosure under the Texas Public Information Act. The withheld documents are attached as Attachments "B" and "C". Other documents responsive to the request will be released.

I. FACTS

The relevant facts are as follows:

1. TTU is an institution of higher education in the State of Texas.
2. Kent Hance was the former Chancellor of Texas Tech University System and is currently an employee of Texas Tech University.
3. Jodey Arrington was the former Chief of Staff to the Chancellor and is no longer employed by Texas Tech University.
4. Mike Leach was the former Texas Tech University Football Coach and was terminated in December 2009.
5. On or about December 29, 2017, Mike Leach filed suit against Texas Tech University and the lawsuit was finally dismissed by the Texas Supreme Court in 2012.
6. On January 8, 2018 the Requestor, Wayne Dolcefino of Dolcefino Consulting filed a lawsuit against Texas Tech University for allegations that Texas Tech University is withholding public records.

II. RELEVANT EXCEPTIONS

A. **TEX. GOV'T CODE §552.103 - Information Relating to Litigation.**

1. Under what is commonly referred to as the "litigation exception," information is excepted from public disclosure "if it is information relating to [civil] litigation...to which the state...is or may be a party or to which an officer or employee of the state..., as a consequence of the person's office or employment, is or may be a party." TEX. GOV'T CODE §552.103(a).
2. The litigation exception enables a governmental body to protect its litigation position by forcing parties seeking information related to the litigation to obtain such documents through the discovery process. *Thomas v. Cornyn*, 71 S.W 3d 473, 487 (Tex. App. – Austin 2002, no pet.); Open Records Decision No. 551, 2002 WL 31827951, (1990) at 2-3; Tex. Att'y Gen. Op. No. 2009-18105, 2009

WL 5127819 at 3 (December 22, 2009). While the litigation exception may overlap with other exceptions encompassing discovery privileges, it is not conditioned on the applicability of any discovery privilege; therefore, a governmental body may properly assert the litigation exception for privileged information (e.g. work product privilege or attorney-client privilege). Open Records Decision No. 677, 2002 WL 31827951 at 2 (2002). A governmental body is not required to demonstrate both the litigation exception and the applicability of a privilege under other law in order to except information from disclosure under the litigation exception. Open Records Decision No. 677, 2002 WL 31827951 at 2 (2002).

3. To qualify under TEX. GOV'T CODE §552.103, the information must be "related to" the subject matter of the litigation. TEX. GOV'T CODE §552.103(a); Open Records Decision No. 551, 2002 WL 31827951 (1990) at 3. For purposes of the Public Information Act ("Act"), the phrase "related to" is construed according to its plain language to mean "pertaining to," "associated with," or "connected with." *University of Texas Law School v. Texas Legal Foundation*, 958 S.W. 2d 479, 483 (Tex. App – Austin 1997, no pet.); *In re Texas Dept. of State Health Services*, 278 S.W. 3d 1, 4 (Tex. App. – Austin 2008, no writ); see *E. I. Du Pont de Nemours and Company v. Shell Oil Company*, 259 S.W. 3d 800, 806 (Tex. App. – Houston [1st Dist.] 2007, reh'g den.) (defining "related to" as meaning "have reference to" or "concern"). "Related to" is broader than "relevant to;" therefore, information can be excepted from disclosure under the litigation exception even if it is not relevant to the substantive issues in the lawsuit. *University of Texas Law School* 958 S.W. 2d at 483. The litigation exception allows a governmental body to withhold a wide range of information because the "related to" standard is much broader than the range of information actually used in litigation. *In re Texas Dept. of State Health Services*, 278 S.W. 3d at 4. The Legislature intended the standard to be broad. *Id.*
4. This exception applies if the litigation is pending or reasonably anticipated on the date that the requestor requests the information. TEX. GOV'T CODE §552.103(c). Litigation is "reasonably anticipated" if there is evidence demonstrating that litigation was "realistically contemplated" on the date of the request, and that the possibility of litigation ensuing was "more than 'mere conjecture.'" Open Records Decision No. 677, 2002 WL 31827951 at 2 (2002). The determination is based on the totality of the circumstances, and may be demonstrated if particular steps toward filing suit have occurred. *Id.* In cases construing the work-product privilege, courts have held that litigation may be "reasonably anticipated" when (1) circumstances would have indicated to a reasonable person that there was a substantial chance of litigation, and (2) the party asserting the exemption had a good faith belief that litigation would ensue. *In re Texas Farmers Insurance*

Exchange, 990 S.W. 2d 937, 342 (Tex. App – Texarkana 1999, orig. proceeding), citing to *Nat'l Tank Co. v. Brotherton*, 851 S.W. 2d 193, 204 (Tex. 1993); Open Records Decision No. 677, 2002 WL 31827951 at 4 (2002).

5. Information in investigatory files related to civil litigation may be withheld from disclosure when the governmental body's attorney determines it should be withheld pursuant to §552.103. Open Records Decision No. 575, 1982 WL 173945 at 1 (1982); Tex. Att'y Gen. Op. OR 2009-16295, 2009 WL 4089419 at 1 (November 17, 2009).
6. In short, there are two prongs that TTU must satisfy in order for documents to be excepted from disclosure under TEX. GOV'T CODE § 552.103: (1) the documents must be related to the litigation and (2) litigation must have been anticipated or in progress at the time the request was received.
 - a) Related: The documents in Attachments "B" and "C" are all related to the termination of former Football Coach Mike Leach. TTU has previously been involved in a lawsuit related to the termination of Mike Leach. In addition, this requestor has filed a lawsuit claiming TTU has not released documents related to the investigation of Mike Leach and other Kent Hance emails related to the same time period as the documents contained in Attachments "B" and "C." Therefore, these documents are related to the existing litigation as they involve the same issue, the termination of Mike Leach, the same university, and the same requestor.
 - b) Litigation:
 - (1) Litigation has already ensued as the requestor filed suit on January 8, 2018. The fact that the withheld documents are related to the existing litigation is enough to meet the litigation requirement under section 552.103. A copy of the case filing can be found in Attachment "D."
 - (2) In addition, the Requestor, Wayne Dolcefino, is the Plaintiff in the lawsuit filed against TTU alleging that TTU has withheld public records.

Therefore, based on the above facts, TTU has met both prongs of the TEX. GOV'T CODE § 552.103 exception, and the documents in Attachment "B" and "C" should be withheld in their entirety to allow the court's discovery process to control the disclosure of these documents and protect TTU's rights and interests.

B. TEX. GOV'T CODE §552.111 - Agency Memoranda

1. An interagency memoranda or letter that would not be available to a party in litigation with the agency is excepted from required disclosure. TEX. GOV'T CODE §552.111. 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 Open Records Decision No. 615 at 5.

2. 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 SW.2s 391, 394 (Tex. App. – San Antonio 1982, writ ref'd n.r.e.); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W. 2d 455, 457 (Tex. App – Houston[14th Dist.] 1996, writ denied); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W. 2d 408, 412 (Tex. App. – Austin 1992, no writ); Open Records Decision No. 538 at 1-2 (1990); Tex. Atty. Gen. Op. No. 2010-15653; and Tex. Atty. Gen. Op. No. 2010-06608.
3. 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. Open Records Decision No. 615 at 5; 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).
4. 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. However, 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); Tex. Atty. Gen. Op. No. 2010-12406; and Tex. Atty. Gen. Op. No. 2010-17898.
5. Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with privity of interest. See Open Records Decision Nos. 631 at 2 (1995); 561 at 9 (1990); Tex. Atty. Gen. Op. No. 2010-15653; and Tex. Atty. Gen. Op. No. 2010-17898. For section 552.111 to apply to communications with a third party, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. See ORD 561 at 9; and Tex. Atty. Gen. Op. No. 2010-15653. 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; *and* Tex. Atty. Gen. Op. No. 2010-15653.

6. 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, and is excepted in its entirety from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor); Tex. Atty. Gen. Op. No. 2010-17898; Tex. Atty. Gen. Op. No. 2010-06608; Tex. Atty. Gen. Op. No. 2010-12406; *and* Tex. Atty. Gen. Op. No. 2010-15653. Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See* ORD 559 at 2-3; *and* Tex. Atty. Gen. Op. No. 2010-17898. Thus, section 552.111 or the "deliberative process privilege" 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* ORD 559 at 2; *and* Tex. Atty. Gen. Op. No. 2010-17898.
7. According to Tex. Atty. Gen. Op. No. 2010-15653, the governmental body must establish the following to demonstrate the deliberative process privilege applies:
 - a) The information constitutes or documents a communication;
 - b) The communication represents the drafter's advice, opinion and recommendation regarding the governmental body's policies or the form and content of a final document that will be released to the public in its final form;
 - c) The communication was between or among the governmental body's employees, representatives, or agents or it was between or among the governmental body and a third party in privity of interest or common deliberative process with the governmental body; *and*
 - d) If the communication was with a third party, the identity of the third party and the nature of its relationship with the governmental body;
 - e) The communication was not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the deliberative process or as necessary for the transmission of the communication. Tex. Atty. Gen. Op. No. 2010-15653. *See also* Tex. Atty. Gen. Op. Nos. 2010-06608 and 2010-17898.
8. We have marked the documents to which 552.111, deliberative process privilege, applies.
 - a) In general, the fact that the document is a communication should be self-evident as it is an email between TTU employees.
 - b) In general, the fact that the document represents the drafter's advice, opinion and recommendation regarding the governmental body's policies

or the form and content of a final document that will be released to the public should also be self-evident as the document is referred to as a draft.

- c) It should be noted that prior to the advent of email, discussions of draft documents and other policy matters occurred verbally in meetings or over the telephone and often resulted in draft copies of documents wherein the reviewers thoughts were recorded upon the document itself. There is no doubt that notes from such deliberations would be protected under the deliberative process privilege. See ORD 559 at 2 (the draft itself, as well as comments made on the draft, underlining, deletions, and proofreading marks, are protected). Email is merely a more efficient manner of communicating such draft edits. As you can see by this email, the comments are suggested modifications of the draft or are requesting further consideration of matters related to the draft document (policy considerations). TTU believes that these deliberating emails are no different from comments or modifications that would have been made to the draft itself in days prior to email communication, and that, in order to preserve the open and frank discussion of contractual and policy matters, they must be protected from disclosure.

9. Therefore, the documents in Attachment "B" that are marked with section 552.111 should be withheld as internal memoranda as described above.

C. TEX. GOV'T CODE §552.1235 - Identity of Private Donor to Institution of Higher Education

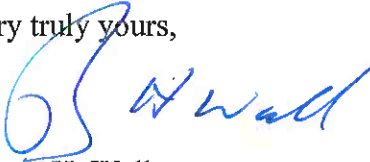
The name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education or to another person with the intent that the money or property be transferred to an institution of higher education is excepted from required disclosure. TEX. GOV'T CODE §552.1235(a). If a donor is a party to or mentioned in any of the documents in Attachment "C" the document will be marked with the 552.1235 exception and the name itself or other identifying information of a donor contained within the document will be clearly marked for redaction. The donor has not agreed to the release of their identity.

IV. CONCLUSION

For the reasons stated above, TTU requests that the records included for your review, and the documents they represent, be excepted from public disclosure in their entirety under TEX. GOV'T CODE §§552.103, 552.111 or 552.1235. If the documents are not withheld in their entirety, then please withhold personal information (552.117), account numbers (552.136), emails (552.137) and any other information required to be withheld under the Texas Public Information Act. We await your decision regarding this matter and thank you in advance for your kind assistance.

Should you have any questions or need any additional information, please do not hesitate to contact me.

Very truly yours,



Ronny H. Wall
Associate General Counsel

Enclosures: Attachment "A" – TTU's letter of February 1, 2018 to Ken Paxton
Attachment "B" – Requested Documents-§552.111
Attachment "C" – Requested Documents-§552.1235
Attachment "D" –Lawsuit filed by Requestor

xc: (without enclosures)

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