



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 9, 2003

Mr. Scott A. Kelly  
Deputy General Counsel  
The Texas A&M University System  
John B. Connally Building, 6<sup>th</sup> Floor  
301 Tarrow  
College Station, Texas 77840-7896

OR2003-4743

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184111.

Texas A&M University-Kingsville (the "university") received a request for all communications regarding the composition of the panel that will hear the proposed termination of a named university faculty member, and all communications to or from any member of the university administration regarding investigations of three named individuals. You advise that the university has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered written comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

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 "for the purpose of facilitating 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 Texas 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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 advise that the information submitted as Exhibits B1 through B19 consists of communications transmitted between privileged parties regarding legal advice provided by a university attorney to the client. You state that these communications were intended to be held in confidence and were treated as confidential. Upon review of your arguments and the submitted information, we conclude that the information in Exhibits B1 through B19 is protected by the attorney-client privilege, and thus, may be withheld under section 552.107.

You further claim that the information submitted as Exhibits C1 through C8 is excepted under section 552.116 of the Government Code. In Senate Bill 1581, which became effective on June 27, 2003, the Seventy-eighth Legislature recently amended section 552.116 of the Government Code. As amended, section 552.116 provides in pertinent part as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) ‘Audit’ means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Act of May 23, 2003, 78<sup>th</sup> Leg., R.S., S.B. 1581, § 1 (current version at Gov't Code § 552.116). A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. You state that the information at issue was prepared and maintained by the Texas A&M University System's Internal Audit Department for the purpose of investigating several university administrators. However, you have not identified the applicable statute, if any, that authorized or required the audit. Thus, you have not demonstrated that the information at issue was prepared or maintained by the state auditor or the auditor of a state agency, an institution of higher education, a county, or a municipality in conducting an audit authorized or required by a statute of this state or the United States. See Gov't Code §§ 552.116(a), (b)(1), (b)(2). Therefore, none of the information may be withheld under section 552.116 of the Government Code.

However, we note that some of the submitted information is subject to section 552.136. Section 552.136 makes certain account numbers confidential. It provides as follows:

**Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.**

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Therefore, the university must withhold the account numbers we have marked pursuant to section 552.136.

Finally, the submitted documents contain a private e-mail address that must be withheld under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b).<sup>1</sup> You do not inform us that the individual to whom the private e-mail address belongs has affirmatively consented to the release of the e-mail address. Therefore, the university must withhold the e-mail address we have marked under section 552.137.

In summary, you may withhold the information in Exhibits B1 through B19 under section 552.107. You must withhold the account numbers we have marked under section 552.136, and the e-mail address we have marked under section 552.137. The remaining submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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<sup>1</sup> We note that section 552.137 does not apply to a government employee's work e-mail address.

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates

Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 184111

Enc. Submitted documents

c: Dr. Robert H. Jackson, Ph.D.  
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(w/o enclosures)