



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2005

Mr. Renaldo L. Stowers
Associate General Counsel
University of North Texas System
P.O. Box 310907
Denton, Texas 76203-0907

OR2005-03856

Dear Mr. Stowers:

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# 223265.

The University of North Texas (the "university") received a request for 1) all documents pertaining to the 2003-2004 tenure and promotion review and 2) all documents related to the 2004-2005 tenure appeals process.¹ You state that some of the information is available for inspection. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

¹We understand that the university is seeking clarification of a portion of the request. Accordingly, should the requestor respond to the request for clarification, the university must seek a ruling from this office before withholding any responsive information from him. *See generally* Open Records Decision No. 633 (1999) (providing for tolling of ten-business-day deadline to request attorney general decision while governmental body awaits clarification).

²Although you also assert the information is excepted under section 552.024, this section does not except information from release, but instead allows for governmental employees to elect to have specific personal information kept confidential.

³We assume that 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information made confidential by other statutes such as section 154.073 of the Civil Practice and Remedies Code. Section 154.073 states in pertinent part:

(a) Except as provided by Subsections (c), (d), (e), and (f)⁴ a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Further, in Open Records Decision No. 658 (1998), this office found that communications during the settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998): *see also* Gov’t Code § 2009.054(c). The documents in Exhibits A, B, C, and F are records made during the course of an alternative dispute resolution proceeding. Thus, the university must withhold these exhibits under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

You also claim that some of remaining information is excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code excepts from disclosure information protected by 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.⁵ TEX. R. EVID. 503(b)(1).

⁴Subsections 154.073(c), (d), (e), and (f) are inapplicable in this instance.

⁵The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.⁶ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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) of the Government Code 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 that the information at issue constitutes communications between attorneys and attorney representatives for the university and university employees. You have identified the parties to these communications. You also state that these communications were made for the purpose of facilitating the rendition of professional legal services, and that these communications were intended to be, and have remained, confidential. Having considered your representations and reviewed the communications at issue, we find that you have established that the information you seek to withhold constitutes privileged attorney-client communications that may be withheld pursuant to section 552.107.⁷

in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

⁶Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

⁷As our ruling on this information is dispositive, we need not address your argument under section 552.117.

In summary, the university must withhold Exhibits A, B, C, and F under section 552.101 in conjunction with section 154.073 of the Civil Practices and Remedies Code. The university may withhold some of the submitted information under section 552.107 of the Government Code. The remaining submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

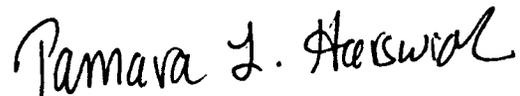
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

Handwritten signature of Tamara L. Harswick in black ink.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 223265

Enc. Submitted documents

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