



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 14, 2007

Ms. Carol Longoria  
Public Information Coordinator  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2007-14989

Dear Ms. Longoria:

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# 294675.

The University of Texas System (the "system") received a request for: (a) information exchanged between the system's Board of Regents and a specified investigator from the system's Office of the Director of Police and (b) information utilized by the system's audit office concerning a whistleblower complaint involving the University of Texas Pan American ("UTPA") president. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you state that some of the information at issue has been previously addressed by this office in Open Records Letter No. 2007-14910 (2007). In Open Records Letter No. 2007-14910, we determined that the system may withhold the submitted documents as audit working papers pursuant to section 552.116 of the Government Code. We presume that the pertinent facts and circumstances have not changed since the issuance of this prior ruling. Thus, we determine that the system may continue to rely on this prior ruling with respect to any information requested in that instance that is also at issue here. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records

or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the requested information was not addressed in Open Records Letter No. 2007-14910, we will address your arguments against disclosure.

You argue that a portion of the submitted information is excepted under section 552.108 of the Government Code. Section 552.108 provides in relevant part as follows:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted. . . if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b)(1), (2). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code § 552.108(b)(1); *See also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Further, a governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. However, section 552.108 is generally not applicable to the records of an internal investigation that is purely administrative in nature. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). Upon review, we find that you have failed to demonstrate that release of the information at issue would interfere with law enforcement or prosecution. Further, you have failed to explain how the information at issue relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. Therefore, you have failed to demonstrate the applicability of sections 552.108(b)(1) and 552.108(b)(2) to the submitted information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide written comments stating reasons why exceptions apply). Accordingly, the submitted information may not be withheld under these exceptions.

Next, you assert that marked portions of the submitted information are excepted under section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 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). Having considered your representations and reviewed the information at issue, we find that you have established that a portion of the submitted information constitutes privileged attorney-client communications. Thus, the information we have marked may be withheld pursuant to section 552.107 of the Government Code. You have failed to demonstrate how the remaining information at issue constitutes a privileged attorney-client communication. Accordingly, it may not be withheld on that basis.

Finally, we note that the submitted information contains information that is protected under section 552.136 of the Government Code.<sup>1</sup> Section 552.136(b) states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device

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<sup>1</sup>Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as it is a mandatory exception to disclosure and may not be waived. *See Gov't Code* § 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). The requested information includes partial credit card numbers. The system must withhold the partial credit card numbers we have marked under section 552.136 of the Government Code.

In summary, the system may continue to rely upon Open Records Letter No. 2007-14910 to the extent that the requested information is covered by this ruling. The system may withhold the information we have marked under section 552.107 of the Government Code. The system must withhold the partial credit card numbers we have marked under section 552.136 of the Government Code. The remaining 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, 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).

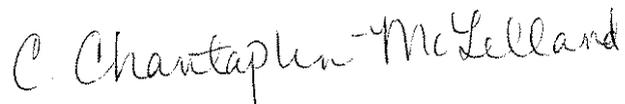
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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,

A handwritten signature in cursive script that reads "C. Chantaplin-McLelland".

Chanita Chantaplin-McLelland  
Assistant Attorney General  
Open Records Division

CC/jb

Ref: ID# 294675

Enc. Submitted documents

cc: Mr. Richard Tansey  
2804 Riverplace Drive, Apt. 3055  
Arlington, Texas 76006  
(w/o enclosures)