



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 28, 2010

Mr. W. Montgomery Meitler  
Assistant Counsel  
Office of Legal Services  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2010-08112

Dear Mr. Meitler:

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# 381599 (TEA PIR# 12858).

The Texas Education Agency ("TEA") received a request for information involving three named entities and a specified time interval. You inform us that some of the information encompassed by the present request is the subject of a previous open records letter ruling. You also state that some of the requested information, including marked portions of the submitted information, either has been or will be released. You claim that the rest of the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the information you submitted.<sup>1</sup>

You state that some of the information responsive to the present request was encompassed by a previous request, as a result of which this office issued Open Records Letter No. 2010-06313 (2010). In that ruling, we concluded that TEA may withhold information relating to an application for an open-enrollment charter under section 552.104 of the Government Code. You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that TEA may

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes TEA to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

continue to rely on Open Records Letter No. 2010-06313 with respect to the information responsive to the present request that is encompassed by the previous ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Next, we address your claim under section 552.107 of the Government Code for the rest of the information at issue. Section 552.107(1) protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 seek to withhold most of the submitted information under section 552.107(1).<sup>2</sup> You state that the information at issue consists of communications between or among attorneys for and representatives of TEA that were made for the purpose of facilitating the rendition

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<sup>2</sup>You inform us that the rest of the submitted information, which you have marked, is being released to the requestor.

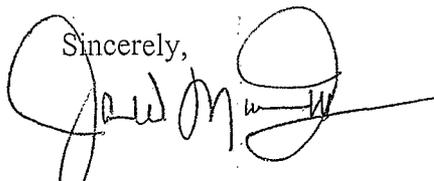
of professional legal services to TEA. You have identified the parties to the communications. You also state that these communications were and remain confidential and have not been disclosed to non-privileged parties. Based on your representations and our review, we conclude that TEA may withhold the information at issue under section 552.107(1).

In summary: (1) TEA may continue to rely on Open Records Letter No. 2010-06313 with respect to the information responsive to the present request that is encompassed by the previous ruling; and (2) except for the marked information that is being released to the requestor, TEA may withhold the submitted information under section 552.107(1) of the Government Code.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/rl

Ref: ID# 381599

Enc: Submitted documents

cc: Requestor  
(w/o enclosures)