



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2010

Mr. Fernando C. Gomez
Vice Chancellor and General Counsel
The Texas State University System
Thomas J. Rusk Building
200 East 10th Street, Suite 600
Austin, Texas 78701-2407

OR2010-11887

Dear Mr. Gomez:

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# 389563.

The Texas State University System (the "system") received a request for seven categories of information pertaining to the finalist chosen by the system for the chancellor position. Specifically the requestor seeks: (1) the application; (2) the finalist's resume or curriculum vitae; (3) letters of recommendation; (4) information pertaining to the professional qualifications, membership in professional organizations, current positions, or publications by the finalist; (5) correspondence to or from the finalist; (6) correspondence to or from persons other than the finalist in relation to the search; and (7) the contract with the finalist upon hiring. You state the system does not have information responsive to the first item of the request.¹ You further state the system will release any information in the system's possession that is considered responsive to items two, four, five, seven, and some of six, with redactions agreed to by the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, we note you have not submitted any information responsive to item three of the request. Further, you have not indicated such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent this information existed on the date of the request, we assume you have released it to the requestor. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (noting if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note the requestor has agreed to the redaction of information subject to sections 552.117 and 552.137 of the Government Code, as well as the names or other identifying information of the candidates for the chancellor position. *See* Gov't Code § 552.117 (excepting the home address and telephone number, social security number, and family member information of employees who timely elect to keep such information confidential); *see id.* § 552.137 (excepting personal e-mail addresses of members of the public from disclosure). The system need not release non-responsive information in response to the request and this ruling will not address such information.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 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). 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.*, 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 pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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). We note communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state the information you marked under section 552.107 constitutes communications between members of the system's Board of Regents (the "board") and system counsel, or among members of the board's Chancellor Search Committee and the consultant hired to generate the chancellor search. You indicate the communications were made for the purpose of facilitating legal services to the system during its search for a chancellor. You also state the confidentiality of these communications has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the system may withhold the information you marked under section 552.107.

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, 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 389563

Enc. Submitted documents

c: Requestor
(w/o enclosures)