



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2010

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-12535

Dear Ms. Chatterjee:

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# 393212 (OGC# 131078).

The University of Texas at Austin (the "university") received a request for any correspondence among university officials regarding athletic conference expansions, including discussion of television markets and rights, from June 1 to June 20. You state that the university will redact e-mail addresses of members of the public from the responsive information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim that some of the submitted information is not subject to the Act. Alternatively, you claim the submitted documents are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² You also state release of some of the requested information may implicate the proprietary interests of The Big 12 Conference, Inc. (the "Big 12 Conference"). Thus, pursuant to section 552.305 of the

¹Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²You state that "much of the information responsive to this request is also responsive [to] many earlier requests the [u]niversity received, including but not limited to [the following:] ID #389553, #390776, #391130, #391317, #391343, #392526, #392524, and #392985[.]" See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001).

Government Code, you notified the Big 12 Conference of the request and of its right to submit arguments to this office as to why the information at issue should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments from the Big 12 Conference. We have considered the submitted arguments and reviewed the submitted information.

Both the university and the Big 12 Conference argue that certain e-mail communications are not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," *see id.* § 552.021, which is defined by section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

You claim that the communications at issue were not collected, assembled, or maintained in connection with the transaction of any official business of the university. You assert, and the records indicate, the marked e-mails consist of information relating to the participation of the university's president on the Board of Directors of the Big 12 Conference (the "board"). You state that the information at issue "was prepared by or for the members of the [board and] was given to President Powers in his capacity as Chair of the [board], and not in performance of his duties as president of the [university]." You state the Big 12 Conference is not a governmental body subject to the Act. In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit determined the Southwest Athletic Conference, the Big 12 Conference's predecessor, is not subject to the Act.

After reviewing your arguments and the information at issue, we agree that the e-mails you have marked do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Therefore, we conclude that these e-mails, which we have marked pursuant to section 552.002 of the Government Code, are not subject to the Act and need not be released in response to this request.³

³As we are able to make this determination, we do not address the university's argument against disclosure of this information.

Section 552.107(1) of the Government Code 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 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 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 assert the remaining marked e-mail consists of a communication between attorneys for and employees and officials of the university. You indicate the communication was made in connection with the rendition of professional legal services for the university. You have identified the parties to the communication. You state the communication was not intended to be, and has not been, disclosed to third parties. Based on your representations and our review, we conclude the remaining marked e-mail is a privileged attorney-client communication and may be withheld under section 552.107(1) of the Government Code.

In summary, the e-mail communications we have marked pursuant to section 552.002 of the Government Code are not subject to the Act and need not be released in response to this

request. The university may withhold the remaining marked e-mail under section 552.107(1) of the Government Code.⁴

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 393212

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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⁴As our ruling is dispositive, we need not address your remaining claim.