ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2010

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

OR2010-18431

Dear Ms. Angadicheril:

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# 402292 (OGC #133507 and #133599.

The University of Texas Health Science Center at Houston (the "university") received two requests from the same requestor. In the first request, the requestor seeks the following information during a specified time period: (1) any records pertaining to the requestor; (2) communications between a named individual and the University of Texas Police; (3) records not previously provided, and (4) records that are being withheld. You state the university requested and received clarification regarding item 2.[1] You state the university has no information responsive to items 3 and 4.[2] In the second request, the requestor seeks any records pertaining to the requestor. You state the university is releasing some of the information pertaining to the requestor. You state the university will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records

[1]*See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

[2]The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Decision No. 684 (2009).[3] You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[4]

Initially, we note the requestor asserts her second request was originally made on April 8, 2010 and the university is late in responding to that request. The submitted information reflects the request made on April 8, 2010 was contained in an e-mail communication between the requestor and the university. However, the Act requires that a request for public information sent by electronic mail be submitted to the officer for public information or that person's designee. Gov't Code § 552.301(c). You state that the April 8, 2010 e-mail was not sent to the university's public information officer or the officer's designee. *See id.* (stating that a written request includes a request in writing that is sent to the officer for public information, or the person designated by that officer, by e-mail or facsimile). Thus, we find that the requestor's e-mail communication of April 8, 2010 was not a valid request pursuant to section 552.301(c) and the university did not violate the procedural requirements of section 552.301 of the Government Code by not responding to this e-mail communication. *See generally id.* § 552.301 (enumerating the responsibilities a governmental body incurs upon receipt of a written request for information that it wishes to withhold). Accordingly, we will address the university's claims against disclosure of the submitted information.

Next, you state some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-09750 (2009) and 2009-10588 (2009). In Open Records Letter Nos. 2009-09750, we ruled that the requested information is excepted from disclosure under section 552.107 of the Government, except to the extent certain non-privileged e-mails exist separate and apart from the submitted e-mail strings. In Open Records Letter Nos. 2009-10588, we ruled that the submitted information must be withheld under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. We have no indication that the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, to the extent the information at issue in the current request is identical to the information previously requested and ruled upon by this office, we conclude the university must continue to withhold or release the information in accordance with Open Records Letter Nos. 2009-09750 and 2009-10588. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely

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[3]Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. The university acknowledges the requestor has a right of access to her own e-mail address. *See* Gov't Code § 552.023.

[4]We 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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not subject to Open Records Letter Nos. 2009-09750 or 2009-10588 , we will address your arguments against disclosure.

You claim the information you have marked is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses confidentiality provisions such as section 161.032 of the Health and Safety Code, which provides in relevant part:

> (c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].
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> . . .
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> (e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.
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> . . .
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> (f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You state the marked information is maintained by the university's Office of Institutional Compliance (the "OIC") in connection with various compliance investigations. You inform us these investigations were performed in accordance with the university's compliance program. You indicate the documents at issue are not made or maintained in the regular course of business. *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Based on your representations and our review, we conclude the marked information consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must withhold the marked information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.[5]

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[5]As our ruling is dispostive, we need not address your argument under section 552.107 for this information.

You claim the remaining submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming 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. 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 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). 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.* 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 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 claim that the information at issue consists of communications in which university employees are seeking legal advice from attorneys representing the university. You state that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Upon review, we find that the university may withhold the information at issue under section 552.107 of the Government Code. We note, however, that some of the individual e-mails you seek to withhold under section 552.107 contained in the submitted e-mail strings consist of communications with non-privileged parties. We have marked these non-privileged e-mails. To the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107 and must be released.

In summary, to the extent the information at issue in the current request is identical to the information previously requested and ruled upon by this office, we conclude the university must withhold or release the information in accordance with Open Records Letter Nos. 2009-

09750 and 2009-10588. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The university generally may withhold the remaining submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107 of the Government Code and must be released.

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,

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 402292

Enc. Submitted documents

c: Requestor
(w/o enclosures)