



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 17, 2011

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

OR2011-08680

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# 422259 (OGC# 136922).

The University of Texas at Arlington (the "university") received a request for information pertaining to a specified salary grievance. You state the university is releasing some of the responsive information. You claim that 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.¹

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

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

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). 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. 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 state the submitted e-mail strings and attachments consist of communications between university attorneys and university officials and employees that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to the submitted information. We note, however, some of the individual e-mail messages in the privileged e-mail strings consist of communications with parties you have not shown to be privileged. Therefore, if these individual e-mail messages, which we have marked, exist separate and apart from the otherwise privileged e-mail strings to which they are attached, the university may not withhold these individual e-mail messages under section 552.107(1) of the Government Code. If the marked e-mail messages do not exist separate and apart from the privileged e-mail strings, the university may withhold them under section 552.107(1) of the Government Code. Regardless, the university may withhold the remaining submitted information under section 552.107(1) of the Government Code.

We note a portion of the non-privileged e-mails may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The university may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual at issue timely elected to keep his personal information confidential, the university must withhold the information we have marked under section 552.117. If the individual at issue did not timely elect to keep his personal information confidential, this information may not be withheld under section 552.117.

In summary, the university may generally withhold the submitted e-mail strings and attachments under section 552.107(1) of the Government Code, but may not withhold the non-privileged individual e-mail messages we have marked if the messages exist separate and apart from the otherwise privileged e-mail strings to which they are attached. If the non-privileged e-mails do exist separate and apart, the university must withhold the information we have marked under section 552.117 of the Government Code if the individual at issue timely elected to keep his personal information confidential. In that instance, the university must release the remaining portions of the non-privileged e-mails.³

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

²The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note that this requestor has a special right of access under section 552.023 of the Government Code to some of the information being released. *See* Gov't Code § 552.023(a). Therefore, if the university receives another request for this information from a person who does not have a special right of access to this information, the university should resubmit this same information and request another decision from this office. *See id.* §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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,

A handwritten signature in cursive script, appearing to read "Tamara H. Holland".

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/bs

Ref: ID# 422259

Enc. Submitted documents

c: Requestor
(w/o enclosures)