



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2011

Ms. Jessica L. Saldivar
Assistant General Counsel
Houston Community College
P.O. Box 667517
Houston, Texas 77266-7517

OR2011-14267

Dear Ms. Saldivar:

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# 431677.

Houston Community College (the "college") received a request for certain communications between the college and certain entities during specified periods. You state the college does not have some of the requested information.¹ You also state the college released some information to the requestor. You claim the remaining information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have considered your claimed exceptions and reviewed the submitted information.

The requestor states she seeks the information at issue both as a member of the public and in her capacity as a college trustee. The purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. An official of a governmental body who, in an official capacity, requests information held by the governmental body is not acting as a member of the public in doing so. Attorney General Opinion JM-119 (1983). Thus, exceptions to public disclosure under the Act do not control

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).

the official's right of access to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district). Because a release to the requestor as a trustee would not be a release to the public, the requestor must be cautious in maintaining the information in the same manner it is maintained by the college. *See generally* Gov't Code § 552.352 (criminal penalties imposed for release of confidential information). However, because the requestor also seeks the submitted information as a member of the public, we will address the public availability of the information.

You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. *Id.* § 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 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 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, orig. proceeding). 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).

In this instance, you explain some of the records are communications between the college, its attorneys, and its insurance representatives, United Educators and Miles Insurance Agency. You state these records were communicated for the purpose of rendering legal assistance and advice to the college and were intended to be and have remained confidential. Based on your representations and our review, we agree the records we marked are communications between and among privileged parties that are protected by the attorney-client privilege. You also acknowledge, however, that the remaining records are communications between the college and representatives of the Harris County District Attorney's Office (the "district attorney"). You do not explain how the district attorney is a privileged party with respect to these communications. *See* TEX. R. EVID. 503(a) (defining "client," "client representative," "lawyer" and "lawyer representative"). Therefore, you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information. Additionally, we note some of the privileged e-mail strings contain non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings. Accordingly, we have marked the information that may be withheld under section 552.107(1).

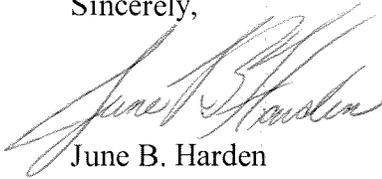
You claim the remaining records are also excepted under section 552.108(a)(2) which exempts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A). Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). In this instance, you seek to withhold the remaining records under section 552.108(a)(2) because they were forwarded to the district attorney to be used in a criminal investigation by that office. You explain the criminal investigation ended in a result other than a conviction or deferred adjudication and the district attorney objects to the records' release. However, the records at issue were created and used by the college for its own administrative and investigatory purposes. The fact these records may also be contained in the district attorney's closed criminal case files does not change the nature of the information that is maintained by the college for its own purposes. *But see* Open Records Decision No. 272 (1981) (stating that at request of law enforcement entity, records of non-law enforcement entity may be withheld under Gov't Code § 552.108(a)(1) so as not to interfere with pending criminal investigation or prosecution). Accordingly, we conclude none of the remaining records may be withheld under section 552.108(a)(2) of the Government Code.

In summary, you may withhold the marked records under section 552.107. The remaining records 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/bs

Ref: ID# 431677

Enc. Submitted documents

c: Requestor
(w/o enclosures)