



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2011

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

OR2011-18033

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# 440202.

Houston Community College (the "college") received a request for the following information: (1) any letter the college sent to the Office of the Attorney General (the "OAG") during a specified time period regarding any request for information under the Act, (2) any letter the college sent to requestors during the same specified time period, and (3) a list of any responsive record or portion thereof the college contends is excepted from disclosure as well as the basis for the contention.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, and 552.117 of the Government Code.² We have considered the exceptions you claim and reviewed the

¹As the requested list of responsive records the college seeks to withhold could not exist at the time the college received the request for information, the Act does not require the college to create and release such a list in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio, 1978, writ dismissed); Open Records Decision No. 555 at 1 (1990) (holding Act only applies to information in existence and does not require creation of new information).

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990)*. We note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See ORD 676 at 1-2*.

submitted information. You state the college has identified and submitted a representative sample of the briefs sent to the requestors.³

Initially, we note you have not submitted unredacted versions of the first category of requested information, correspondence the college sent to the OAG during the specified time period.⁴ The redacted versions you submitted do not enable this office to determine whether the redacted information comes within the scope of an exception to disclosure. Section 552.301 of the Government Code prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) requires a governmental body to submit the specific information at issue to this office, or representative samples if the information is voluminous, unless the governmental body is authorized to withhold the information without requesting a ruling from this office pursuant to statute, *see, e.g., id.* §§ 552.024(c), .147, or a previous determination. *See id.* § 552.301(e)(1)(D); Open Records Decision No. 673 (2001) (describing types of previous determinations). We know of no authority under the Act for the college to withhold the redacted information without requesting a decision. Because you have not submitted the redacted information for our review, we have no basis for finding it confidential or excepted from disclosure under the exceptions you raise. Thus, we have no choice but to order the college to release the information in accordance with section 552.302 of the Government Code. *See* Gov't Code §§ 552.301, .302. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We next turn to the exceptions you raise for the submitted information. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. You first bring your claim under section 552.101 by arguing “information contained in the briefs related to the section 552.101 exemption should remain confidential because of the criminal

³We assume the “representative sample” of these briefs is truly representative of the requested records responsive to the request for letters the college sent the requestors. *See* Open Records Decision Nos. 499 (1988), 497 (1988).

⁴The submitted information includes copies of redacted briefs. You state the college redacted portions of the briefs to prevent disclosure of the substance of the information at issue to the requestors. The submitted information also includes correspondence, other than briefs, the college submitted to this office. The submitted information relates to four requests for rulings the college made to this office, in response to which this office issued Open Records Ruling Nos. 2011-16551 (2011), 2011-16801 (2011), 2011-17257 (2011), and 2011-17259 (2011). In Open Records Ruling Nos. 2011-16551, 2011-16801, and 2011-17259, this office found the college redacted its discussion of the claimed exceptions, including information that does not disclose or contain the substance of the information requested, from its briefs sent to the requestors and therefore failed to comply with the requirements of section 552.301(e-1) of the Government Code in requesting the rulings. *See* Gov't Code § 552.301(e)(1)(A) (governmental body that requests open records ruling must submit to OAG written comments stating reasons why exceptions apply that would allow information to be withheld), .301(e-1) (governmental body may redact information from required copy of comments sent to requestor if comments disclose or contain substance of information requested).

investigation by the U.S. Department of Education.” You provide details about this investigation and argue, “[d]isclosure of any of this information could potentially hinder this ongoing investigation. Therefore, the [c]ollege asks that this information be excepted from public disclosure under section 552.101.” However, because section 552.101 excepts from disclosure information made confidential by law and because you have not cited to any law that makes the information at issue confidential, we find the college may not withhold the information under section 552.101 based on these arguments.

You also raise section 552.101 based on the theory that information is confidential when a federal agency shares confidential information with a state agency. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561 we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that the federal Freedom of Information Act (“FOIA”) applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that: “when information in the possession of a federal agency is ‘deemed confidential’ by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law.” *Id.* at 7. Accordingly, if a federal agency shares its information with a Texas governmental agency, the Texas agency must withhold the information the federal agency determines to be confidential under federal law. *See id.* at 6-7; *accord United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (finding documents FBI lent to city police department remained property of FBI and were subject to any restrictions on dissemination of FBI-placed documents).

Beyond your general statements regarding FOIA, you have not directed our attention to any federal law, nor are we aware of any, that makes the requested information confidential. Furthermore, you do not indicate any federal agency has shared the information at issue with the college. Therefore, the college may not withhold the requested information under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 also encompasses section 143.1214 of the Local Government Code. You assert section 143.1214 is applicable to the submitted information. We note, however, chapter 143 applies only to municipalities with a population of 10,000 or more that have a paid fire department or police department and have voted to adopt this chapter. Local Gov’t § 143.002(a). We further note subchapter G of chapter 143, which contains section 143.1214, “applies only to a municipality with a population of 1.5 million or more.”

Local Gov't § 143.101(a). You do not explain how the college is a municipality for purposes of chapter 143 of the Local Government Code. We therefore conclude you have failed to show the submitted information is confidential under section 143.1214 of the Local Government Code, and the college may not withhold any information under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. Upon review, we find the none of the submitted information is private. Therefore, the college may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim section 552.102(a) of the Government Code for the submitted information. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov't Code § 552.102(a). Upon review, we find no portion of the submitted information is excepted from disclosure under section 552.102(a) of the Government Code. Accordingly, none of the remaining information may be withheld on that basis.

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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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.*, 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 claim the submitted information is protected by section 552.107(1) of the Government Code because the United States Department of Education Office of Inspector General (“DOE-OIG”) “has instructed the [c]ollege to be diligent in trying to keep information related to [an ongoing criminal] investigation confidential.” You state the college’s general counsel was communicating with the DOE-OIG on the college’s behalf. You further state these communication were confidential. However, the submitted information consists of correspondence sent to requestors. You have failed to show how either the DOE-OIG or the requestors are privileged parties. Therefore, you have failed to demonstrate how the information at issue consists of communications between privileged parties. *See TEX. R. EVID.* 503(b)(1)(c). Thus, the college may not withhold any of the information at issue under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5* (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a representation from the law enforcement agency that it wishes to have the information withheld and a demonstration the information relates to the pending case.

You state, and provide documentation showing, the DOE-OIG objects to the release of the information addressed in the submitted correspondence because its release would interfere with an open criminal investigation being conducted by the DOE-OIG. We understand the DOE-OIG is a law enforcement agency with the power to investigate and prosecute crimes. *See 5 U.S.C. app. 3 §§ 4, 6* (1978). We note, however, the submitted information consists of correspondence the college sent to requestors relating to requests for information under the Act. Upon review, we find you have failed to demonstrate how release of the submitted

information would interfere with the detection, investigation, or prosecution of crime. Thus, the college may not withhold any of the submitted information under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). None of the submitted information consists of the home address, telephone number, emergency contact information, social security number, or family member information of a college official or employee. Accordingly, the college may not withhold any of the submitted information under section 552.117 of the Government Code.

We note the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address we have marked does not appear to be specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the college must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless its owner consents to its release.⁵ As you raise no further exception to disclosure, the college must release the remaining information.⁶

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

⁵We note this office issued Open Records Decision No. 684 (2009), 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.

⁶We note the information being released contains an e-mail address to which the requestor has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). Accordingly, if the district receives another request from an individual other than this requestor, the district is authorized to withhold the e-mail address under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 without the necessity of requesting an attorney general decision.

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 black ink, appearing to read "Kay Hastings". The signature is fluid and cursive, with a large loop at the end.

Kay Hastings
Assistant Attorney General
Open Records Division

KHG/em

Ref: ID# 440202

Enc. Submitted documents

c: Requestor
(w/o enclosures)