



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2012

Mr. William Franz
General Counsel
The Texas Higher Education Coordinating Board
P.O. Box 12788
Austin, Texas 78711

OR2012-19746

Dear Mr. Franz:

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# 473093 (PIR No. 12.09.18.01).

The Texas Higher Education Coordinating Board (the "board") received a request for information pertaining to the board's placement and/or removal of two named institutions from a listing of institutions whose degrees are illegal to use in Texas.¹ You state you have made some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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 the information constitutes or documents a

¹You state, and provide documentation showing, the board sought and received clarification of the information requested. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We 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 that those records contain substantially different types of information than that submitted to this office.

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.*, 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 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 information consist of communications between board attorneys, board staff, and members of the Office of the Attorney General’s General Litigation Division. You explain the Attorney General represents the board. You state the communications were made in furtherance of the rendition of professional legal services regarding litigation with one of the named institutions and the analysis and interpretation of law. You further state the communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. Accordingly, the board may generally withhold the submitted information under section 552.107(1) of the Government Code.³ We note, however, one of the submitted e-mail strings includes e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the board separate and apart from the otherwise privileged e-mail string in which they appear, then the board may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

To the extent the e-mails we have marked exist separate and apart from the otherwise attorney-client privileged e-mail strings, portions of the non-privileged communications contain e-mail addresses that may be subject to section 552.137 of the Government Code.⁴ Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). Accordingly, the board must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the board may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the board maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail string in which they appear, the board may not withhold the marked e-mails under section 552.107(1), and they must be released. The board must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release.

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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/dls

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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Enc. Submitted documents

**c: Requestor
(w/o enclosures)**