



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2013

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
301 Tarrow Street, Sixth Floor
College Station, Texas 77840-7896

OR2013-22387

Dear Mr. Moore:

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# 509600 (TAMU 13-647 and 13-648 and SO-13-099).

Texas A&M University and the Texas A&M University System (collectively the "university") received three requests from the same requestor for all e-mails from the e-mail accounts used for university business of eight named individuals or the university's board of regents from January 1, 2011 to the date of the request, and all e-mails in a delete folder or saved by a personal information manager tool on those same e-mail accounts from January 1, 2013 to the date of the request, mentioning a specified word or discussing a specified topic.¹ You claim the requested information is excepted from disclosure under sections 552.104, 552.107, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note we have combined these requests, which originally were assigned identification numbers 509597, 509600 and 509601, under identification number 509600.

²We 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.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

You state the information you have marked Exhibit B-1 concerns the proposed establishment of a branch campus of the university. You state the university has identified an organization it hopes to enter into an agreement with in order to establish this branch campus. You argue that, because a formal agreement has not been finalized, releasing the information in Exhibit B-1 would be detrimental to the university's ability to negotiate the most favorable terms. Having considered your arguments and reviewed the information you seek to withhold, we find you have not demonstrated the information in Exhibit B-1 is related to a competitive matter for purposes of section 552.104(a). We therefore conclude the university may not withhold Exhibit B-1 under section 552.104 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 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 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). 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 to only 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 to only 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).

You state the information you have marked Exhibit B-2 is representative of communications between university attorneys and university administrators that were made expressly for the purpose of facilitating the rendition of professional legal services to the university. You also state the communications were intended to be confidential and that confidentiality has been maintained. Based on your representations and our review, we find the university may withhold Exhibit B-2 under section 552.107(1) of the Government Code.

Section 552.1235 excepts from disclosure “[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). You state the information you have marked in Exhibit B-3 tends to identify donors to an institution of higher education. We note, a post office box number does not tend to disclose a person’s identity; thus, the university may not withhold the post office box numbers you have marked as identifying information of donors under section 552.1235. However, we find the university must withhold the remaining identifying information of donors you have marked pursuant to section 552.1235 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).³ Gov’t Code § 552.137(a)-(c). Accordingly, the university must withhold the e-mail addresses we have marked under section 552.137 of the

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code, unless the owners of the addresses have affirmatively consented to their release.⁴

In summary, the university may withhold Exhibit B-2 under section 552.107(1) of the Government Code. With the exception of post office box numbers, the university must withhold the donors' identifying information you have marked in Exhibit B-3 under section 552.1235 of the Government Code. The university 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. The remaining information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 509600

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴Open Records Decision No. 684 (2009) is 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 a decision under the Act.