



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2007

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
Office of the General Counsel
A&M System Building, Suite 2079
200 Technology Way
College Station, Texas 77845-3424

OR2007-08298

Dear Mr. Kelly:

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# 282482.

The Texas A&M University System (the "university") received two requests from the same requestor for the following: (1) information related to correspondence between a named professor and the Centers for Disease Control (the "CDC") and United States Department of Agriculture (the "USDA") between February 1, 2006 and the date of the request; (2) the call logs of the named professor for February, March, April, and May of 2006; (3) all e-mails sent or received by the named professor and two other individuals regarding possible or actual exposure to biological agents from April 9, 2007 through the date of the request; (4) the call logs of the named individuals for the same period; and (5) all correspondence between the university's Select Agent Responsible Official and the CDC or USDA regarding theft, loss, and release of a select agent between February 1, 2006 and the date of the request. You state that the university does not maintain some of the requested information.¹ You state that the university has released some of the requested information. You claim that some of the submitted information is not subject to the Act and that portions of the remaining information are excepted from disclosure under sections 552.101, 552.107, and 552.137 of

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

the Government Code. You have also notified the USDA and Virginia Polytechnic Institute and State University (“Virginia Tech”), of one the requests, which, you assert, implicates the proprietary interests of these entities. *See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have considered all submitted arguments and reviewed the submitted information, portions of which consist of representative samples.²

Initially, we address your claim that portions of the submitted information are not subject to the Act. The Act applies only to “public information.” *See* Gov’t Code § 552.021. Section 552.002 of the Government Code defines public information as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. Information is generally subject to chapter 552 when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. Open Records Decision No. 635 (1995). You explain that the information at issue relates to a named professor’s work with the USDA “in his individual capacity to review and assess the scientific quality and merit of the [USDA’s Agricultural Research Service] research project plan in question.” You further state that the Dean of the university’s College of Veterinary Medicine has informed you that the information at issue relates to work “undertaken independent of the reviewer’s university” In addition, the USDA states that the records at issue “are not related to the business operations or educational mission of [the university].” Based on these representations and our review, we find that the information related to work performed by the named professor in his individual capacity on behalf of the USDA was not collected, assembled, or maintained by or for the university under a law or ordinance or in connection with the transaction of official business. *See* Gov’t Code § 552.002. Therefore, this information is not subject to the Act and need not be released.

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.

We next address your arguments for the submitted information that is subject to the Act. Section 552.101 of the Government Code excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information protected by other statutes. You assert that certain building names and room numbers are confidential under section 418.178 of the Government Code. As part of the Texas Homeland Security Act, section 418.178 was added to chapter 418 of the Government Code. Section 418.178 provides:

(a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Gov’t Code § 418.178. The fact that information may generally relate to biological toxins does not make the information *per se* confidential under section 418.178. *See generally* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See generally* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). After reviewing your arguments and the information at issue, we conclude that, in this instance, the university must withhold the highlighted building names and room numbers under section 552.101 in conjunction with section 418.178(b)(2)(A).

We next address your claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. *Id.* § 552.107. 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 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)(A), (B), (C), (D), (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.* 503(b)(1), 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, no writ). 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 that the marked portion of the submitted information constitutes a confidential attorney-client communication between an attorney for the university and university administrators. You further contend that this communication was made for the purpose of facilitating the rendition of professional legal services and was intended to be confidential. Having considered these representations and the information at issue, we find that the university has established that the marked portions of the submitted information constitute privileged attorney-client communications that may be withheld pursuant to section 552.107 of the Government Code.

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). *See* Gov’t Code § 552.137(a)-(c)). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Thus, the university must withhold the e-mail addresses it has marked and the additional e-mail addresses that we have marked under section 552.137 unless the owners of the e-mail addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, information relating to work performed by the named professor in his individual capacity is not subject to the Act and need not be released. The highlighted building names and room numbers that you have marked must be withheld under section 552.101 in conjunction with section 418.178(b)(2)(A). The university may withhold the attorney-client communications that you have marked under section 552.107 of the Government Code. Finally, the university must withhold the e-mail addresses that you have marked and the additional e-mail addresses that we have marked unless their owners have consented to their release pursuant to section 552.137 of the Government Code. The remaining information must be released to the requestor.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eeg

Ref: ID# 282482

Enc. Submitted documents

c: Mr. Edward Hammond
1920 Stugart Street
Berkley, California 94703
(w/o enclosures)