



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2009

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

OR2009-13564

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# 356402.

Texas A&M University (the "university") received a request for all e-mails sent to or from a named individual pertaining to either Lexicon Pharmaceuticals or the Texas Institute of Genomic Medicine during a specified time period. You state you will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note the requestor agreed to exclude personal e-mail addresses, phone numbers, or any other contact information from the request. Thus, any personal e-mail addresses, phone numbers, or any other contact information within the information at issue are not responsive to the present request for information. We also note that the request is for e-mails sent to or from a named individual. However, you have submitted e-mail chains including

¹We 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.

e-mails that were not sent to or from the named individual. Thus, any e-mails that were not sent to or from the named individual are not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request and the university is not required to release that information in response to the request.

Next, we note that some of the requested information may have been the subject of two previous rulings issued by this office. In Open Records Letter Nos. 2009-12890 (2009) and 2009-13492 (2009), we ruled that portions of the submitted information were excepted from public disclosure under section 552.107 of the Government Code. To the extent any portion of the requested information was ruled upon in Open Records Letter Nos. 2009-12890 and 2009-13492, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the university must continue to rely on Open Records Letter Nos. 2009-12890 and 2009-13492 as previous determinations and withhold or release the requested information under section 552.107 in accordance with those decisions. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent that the requested information was not addressed in our prior rulings, we will address your claims for exception from disclosure.

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 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). 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.* 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 pet.). 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 claim that the information at issue consists of “communications that were made in the course of providing professional legal services to [university] administrators.” You state that the communications were intended to be and have remained confidential. You have identified most of the parties to the communications. Upon review, we find that the university may withhold the responsive information at issue under section 552.107 of the Government Code. However, one of the individual e-mails contained in the e-mail strings is a communication with parties you have not identified. Further, you have not otherwise described the relationship these parties have with the university. Therefore, we conclude you have failed to establish how this e-mail, which we have marked, constitutes a communication between or among university representatives and attorneys for the purposes of section 552.107. Thus, to the extent that this non-privileged e-mail exists separate and apart from the submitted e-mail chains, it may not be withheld under section 552.107.

In summary, to the extent any portion of the requested information was ruled upon in Open Records Letter Nos. 2009-12890 and 2009-13492, the university must continue to rely on Open Records Letter Nos. 2009-12890 and 2009-13492 as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent the submitted information is not covered by our previous rulings, the university may withhold the submitted responsive information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mail we have marked exists separate and apart from the submitted e-mail chains, the university must release it.

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,

A handwritten signature in black ink, appearing to read "GH", with a long horizontal flourish extending to the right.

Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID#356402

Enc. Submitted documents

c: Requestor
(w/o enclosures)