



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 1, 2011

Mr. R. Brooks Moore  
Assistant General Counsel  
The Texas A&M University System  
200 Technology Way, Suite 2079  
College Station, Texas 77845-3424

OR2011-16050

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# 434983 (TAMU# 11-474).

The Texas A&M University (the "university") received a request for e-mails to or from two named individuals or any member of the university's board of regents during a specified time period that contain any of several words or phrases. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.1235 of the Government Code. Further, although you take no position as to whether some of the remaining submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of the Big 12 Conference (the "Big 12"). Accordingly, you state, and provide documentation showing, you notified the Big 12 of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from an

attorney for the Big 12. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, the Big 12 argues the submitted information is not subject to the Act. Section 552.021 of the Government Code provides for public access to “public information,” *see id.* § 552.021, which is defined by section 552.002 of the Government Code 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(a). The Big 12 contends the submitted information is not subject to the Act because the information was generated by the Big 12, which is not a governmental body. We note, however, the information at issue was sent to the university’s athletic director and another university official, and is in the possession of the university. Furthermore, this information was collected, assembled, or maintained in connection with the transaction of the university’s official business, and the university has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and must be released, unless the Big 12 demonstrates the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021.

The Big 12 argues some of the responsive information is confidential because the information is made confidential by contracts between the Big 12 and various third party television networks; release of the information would cause the Big 12 to be in breach of those contracts; and the Big 12 provided the information to the university with the expectation the information would remain confidential. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the information the Big 12 seeks to withhold comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.107(1) of the Government Code excepts from disclosure “information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]” Gov’t Code § 552.107(1). Section 552.107(1) 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

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<sup>1</sup>We 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 those records contain substantially different types of information than that submitted to this office.

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). 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 state some of the submitted information, which you have marked, consists of communications involving university attorneys, legal staff, and employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the university. You state these communications were confidential, and you state the university has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the university may generally withhold the information you have marked under section 552.107(1) of the Government Code. We note several of the individual e-mails contained in the otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent these

non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1).

The Big 12 claims its information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1), however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). As the university does not seek to withhold any of the remaining information pursuant section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to any portion of the remaining information, and it may not be withheld on that basis. *See* ORD 676.

Section 552.1235 of the Government Code 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). “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” *See* Educ. Code § 61.003.

You seek to withhold portions of the remaining information under section 552.1235. You state the information you have marked pertains to individuals who are university donors and who have not given the university permission to release their names and other identifying information. Based upon your representations and our review, we agree portions of the information at issue, which we have marked, identify persons who are donors to the university. Accordingly, we conclude the university must withhold the information we have marked under section 552.1235 of the Government Code. However, we find you have failed to demonstrate the remaining information you have marked identifies individuals in their actual capacity as donors to the university for purposes of section 552.1235. Accordingly, the remaining information you have marked may not be withheld under section 552.1235 of the Government Code.

We note the remaining responsive information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. This section 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(c)(1) states an e-mail address “provided to a governmental body by a person who has a contractual relationship

with the governmental body or by the contractor's agent" is not excepted from public disclosure. *Id.* § 552.137(c)(1). Thus, the university must withhold the e-mail addresses we have marked within the remaining responsive information under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. The Big 12 also claims additional specified e-mail addresses in the remaining responsive information are excepted from disclosure under section 552.137. In this instance, however, the remaining e-mail addresses at issue belong to representatives of the Big 12, which has contracted with the university. Because of the contractual relationship between the university and the Big 12, the remaining e-mail addresses are specifically excluded by section Mr. R. Brooks Moore 552.137(c)(1). Consequently, the university may not withhold remaining the e-mail addresses at issue under section 552.137 of the Government Code.

In summary, the university may generally withhold the information you have marked under section 552.107(1) of the Government Code; however to the extent the marked non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1). The university must withhold the information we have marked 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 their owners have affirmatively consented to their public disclosure. 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.oag.state.tx.us/open/index\\_orl.php](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,



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Open Records Division

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Enc. Submitted documents

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