ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2013

Mr. John Sirman
Legal Counsel
State Bar of Texas
1414 Colorado Street
Austin, Texas 78711

OR2013-11023

Dear Mr. Sirman:

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# 491713.

The State Bar of Texas (the "state bar") received a request for any correspondence received or sent by any employee, board member, committee member, or volunteer of the state bar and the Texas Young Lawyers Association pertaining to the 2013 president-elect election. We note you have redacted personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).[1] You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

Initially, we address your contention the submitted e-mails in Attachment D are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of

[1]We note Open Records Decision No. 684 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 an attorney general decision.

[2]Although you initially raised sections 552.103 and 552.111 of the Government Code, you informed us in a letter dated May 1, 2013, that the state bar withdraws its arguments under these sections.

[3]We 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.

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." Gov't Code § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

You state the submitted e-mails in Attachment D concern the subject matter of the request, but they were "intended as a communication between friends and colleagues and not as an official record of the state bar." However, upon review, we find the e-mails at issue were collected or assembled or are maintained in connection with the transaction of official state bar business; thus, these e-mails constitute "public information" as defined by section 552.002(a). Accordingly, Attachment D is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.305(b).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See id.* § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You assert the information in Attachment D is confidential under common-law privacy. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Therefore, the state bar must withhold the information we have marked in Attachment D under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code 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 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, 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 contend the e-mails in Attachment C consist of attorney-client privileged communications between legal counsel for the state bar and officers, board members, the executive director, and staff members of the state bar. You state these communications were made in furtherance of the rendition of professional legal services. You further state the communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information in Attachment C. Thus, the state bar may generally withhold the information in Attachment C under section 552.107(1) of the Government Code. We note, however, some of the submitted e-mail strings include e-mails received from or sent to individuals you have not explained are privileged parties. Furthermore, if the e-mails received from or sent to the non-privileged parties are removed from the e-mail strings 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 state bar separate and apart from the otherwise privileged e-mail strings in which they appear, then the state bar may not withhold these non-privileged e-mails under section 552.107(1) 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).[4] *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the state bar must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the state bar must withhold the information we have marked in Attachment D under section 552.101 of the Government Code in conjunction with common-law privacy. The state bar may generally withhold the information in Attachment C under section 552.107(1) of the Government Code. However, if the non-privileged e mails, which we have marked, exist separate and apart from the otherwise privileged e-mail string in which they appear, then the state bar may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The state bar must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent 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.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,

Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

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[4]The 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).

Ref: ID# 491713

Enc. Submitted documents

c: Requestor
(w/o enclosures)