



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2014

Ms. Cynthia Tynan
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2014-12934

Dear Ms. Tynan:

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# 528827 (OGC# 155730).

The University of Texas Southwestern Medical Center (the "university") received a request for all documents relating to the requestor's medical file and a specified allegation against the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. Additionally, you state, and provide documentation showing, you notified the Texas Medical Board (the "board") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have received comments from the board. We have reviewed the submitted arguments and the submitted representative sample of information.¹

¹We 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.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See id.* § 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. *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 state the submitted information consists of communications involving attorneys for the university and university 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 intended to be, and have remained, 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 at issue. Thus, the university may generally withhold the information at issue under section 552.107(1) of

the Government Code.² However, we note, and you acknowledge, some of the e-mail strings, which you have marked, include communications received from the requestor, who you acknowledge is not a privileged party. In addition, we note one of the submitted e-mail strings includes an attachment received from the board, which you have not demonstrated to be a privileged party. Furthermore, if the communications and attachment received from these 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 communications you have marked and the non-privileged attachment we have marked are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, then the university may not withhold them under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. In the event the non-privileged attachment we have marked is maintained by the university separate and apart from the otherwise privileged e-mail string in which it appears, the university and the board assert the non-privileged attachment is confidential under section 164.007 of the Occupations Code, which is encompassed by section 552.101 of the Government Code. Section 164.007(c) provides:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occ. Code § 164.007(c). The information at issue consists of information created by the board relating to a licensed physician. The board argues the information at issue is confidential under section 164.007(c) because the information is part of the board’s investigative file regarding a license holder. By its terms, section 164.007(c) makes information confidential when in the possession of the board, its employees, or agents. In this instance, however, the information at issue is in the possession of the university. Furthermore, the university is not acting as an employee or agent of the board in maintaining these records. Therefore, we conclude section 164.007(c) does not make the information at issue confidential in this instance. Consequently, the university may not withhold the

²As our ruling is dispositive, we do not address the remaining arguments to withhold this information.

non-privileged attachment under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code.

The university also claims the non-privileged attachment is subject to section 160.006 of the Occupations Code, which provides in relevant part:

(a) A record, report, or other information received and maintained by the board under [Subchapter A] or Subchapter B, including any material received or developed by the board during an investigation or hearing and the identity of, and reports made by, a physician performing or supervising compliance monitoring for the board, is confidential.

Id. § 160.006(a). By its terms, section 160.006(a) makes information confidential if it is maintained by the board. You state the non-privileged attachment was received or developed by the board during an investigation. However, we note the information at issue is maintained by the university. Accordingly, we conclude the non-privileged attachment is not confidential under section 160.006(a). Thus, the university may not withhold the non-privileged attachment under section 552.101 of the Government Code on this basis.

In summary, the university may withhold the information at issue under section 552.107(1) of the Government Code. However, if the non-privileged communications you have marked and the non-privileged attachment we have marked are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, then the university must release this information to the requestor.³

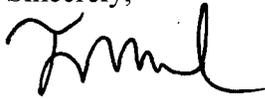
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

³We note to the extent this information is released, it contains information to which the requestor has a right of access. See Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information may be confidential with respect to the general public, if the university receives another request for this information from a different requestor, the university must again seek a ruling from this office.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Neal". The signature is fluid and cursive, with the first name "Tim" being more prominent than the last name "Neal".

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 528827

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Robert J. Blech
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018
(w/o enclosures)