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ATTORNEY GENERAL OF TEXAS

December 12, 2016

Ms. Katherine Antwi Green
Associate General Counsel
University of North Texas System
1155 Union Circle #310907
Denton, Texas 76203-5017

OR2016-27449

Dear Ms. Green:

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# 637354 (UNT PIR No. 001169).

The University of North Texas System (the "system") received a request for e-mail correspondence and attachments sent from or received by a named individual during a specified time period. You state the system released some information to the requestor. You claim 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 We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the system did not meet its procedural obligations under section 552.301 of the Government Code, because the information the system has submitted as responsive to the instant request was also responsive to a prior request for information the requestor made on August 9, 2016, for which the system did not

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.

seek a ruling from this office. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Pursuant to section 552.301(b), within ten business days of receipt of the request the governmental body must ask for a decision from this office and state which exceptions apply to the requested information. *Id.* § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of a request the governmental body must submit to this office, among other items, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The requestor asserts the information now at issue was responsive to the requestor's previous request for e-mail correspondence and attachments sent from or received by a named individual during a specified time period. Thus, the requestor argues the system violated section 552.301 by failing to either release this information in response to the earlier requests or timely seek a decision from this office. The system explains it responded to the previous request for information by releasing the information the system deemed to be responsive to the requestor. We note a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See Open Records Decision No. 561 at 8 (1990)*. We further note this office is unable to resolve disputes of fact in the open records ruling process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986)*. Accordingly, where an issue cannot be resolved as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD 552 at 4*. Therefore, based on the system's representations and the information provided to this office, we conclude the system made a good faith effort and released or requested a ruling for all information maintained by the system that was responsive to the previous request. Thus, we find the system complied with section 552.301 of the Government Code with respect to these requests, and we will consider the system's argument against disclosure of the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See Gov't Code § 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. *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 "to facilitate 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). 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. T EX. 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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 assert the submitted information consists of communications between and among system attorneys and system employees or officials for the purpose of providing legal advice to and on behalf of the system. You indicate the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the system has demonstrated the applicability of the attorney-client privilege to this information. Thus, the system may generally withhold the submitted e-mails 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 non-privileged parties, including the requestor. Furthermore, if the e-mails received from or sent to 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 system separate and apart from the otherwise privileged e-mail strings in which they appear, then the system may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code and must release the remaining information.²

²We note the requestor has a right of access to some of the information being released in this instance. *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). Thus, if the system receives another request for the same information from a different requestor, the system must again seek a decision from this office.

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,



Ian Lancaster
Assistant Attorney General
Open Records Division

IML/akg

Ref: ID# 637354

Enc. Submitted documents

c: Requestor
(w/o enclosures)