



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 15, 2019

Ms. April M. Liwanag
Assistant General Counsel
Texas Board of Nursing
333 Guadalupe Street, Suite 3-460
Austin, Texas 78701

OR2019-28895

Dear Ms. Liwanag:

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# 792930 (ORR# 19-30).

The Texas Board of Nursing (the "board") received a request for e-mails related to nurses working in migrant detention centers. The board claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Additionally, the board states, and provides documentation showing, it notified the United States Immigration and Customs Enforcement Health Services Corps ("ICECorps") and the Texas Medical Board (the "TMB") of the request for information and the right to submit comments to this office why some of the submitted information should not be released.¹ 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 ICECorps. We have considered the submitted arguments and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming 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. 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.

¹ As of the date of this letter, this office has not received comments from the TMB explaining why any of the submitted information should not be released.

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. 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: (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).

The board states some of the submitted information, which it marked, consists of communications involving attorneys for the board and board employees and officials in their capacities as clients. The board states these communications were made in furtherance of the rendition of professional legal services to the board. The board states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the board has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the board may withhold the information it marked under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. ICECorps assert portions of the remaining information are confidential under the provisions found in sections 552(b)(5), 552(b)(6), and 552(b)(7)(C) of the Freedom of Information Act (“FOIA”), section 552 of title 5 of the United States Code. Generally, FOIA applies only to federal agencies and does not apply to records held by state agencies. Open Records Decision No. 561 at 6 (1990). Section 552(b)(5) of FOIA protects “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]” *See* 5 U.S.C. § 552(b)(5). Section 552(b)(6) of FOIA exempts from public

disclosure personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *See id.* § 552(b)(6). Section 552(b)(7)(C) exempts records or information compiled for law enforcement purposes to the extent production of such law enforcement records or information could reasonably be expected constitute an unwarranted invasion of personal privacy. *See id.* § 552(b)(7)(C). Information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95; Open Records Decision No. 124 (1976).

However, this office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561, 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded “when information in the possession of a federal agency is ‘deemed confidential’ by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, section 552.101 requires a local government to respect the confidentiality imposed on the information by federal law.” ORD 561 at 7.

ICECorps informs this office portions of the remaining information, which ICECorps marked, were provided to the board by ICECorps. ICECorps also informs this office that it considers the information at issue to be confidential under the provisions found in sections 552(b)(5), 552(b)(6), and 552(b)(7)(C) of title 5 of the United States Code. *See* 5 U.S.C. §§ 552(b)(5), (b)(6), (b)(7)(C). Therefore, we conclude the board must withhold the information ICECorps marked under section 552.101 of the Government Code in conjunction with federal law.

In summary, the board may withhold the information it marked under section 552.107(1) of the Government Code. The board must withhold the information ICECorps marked under section 552.101 of the Government Code in conjunction with federal law. The board must release the remaining information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open

Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/eb

Ref: ID# 792930

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)