



Office of General Counsel

## THE TEXAS A&M UNIVERSITY SYSTEM

January 30, 2024

Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

**via OAG E-Filing**

Re: Request for a Decision regarding a Public Information Request from Robert Montoya to Texas A&M University (J000080-010824)

Dear Open Records Division:

On January 18, 2024<sup>1</sup>, Texas A&M University (the “university”) received a public information request from Robert Montoya (the “requestor”). The request, enclosed as Exhibit A, seeks communications from university administrators.

We believe that a portion of the requested information is excepted from disclosure under the Texas Public Information Act, Government Code, Chapter 552 (“Act”), as explained below. Therefore, we are requesting a decision regarding this information.

### **Section 552.107. Exception: Certain Legal Matters**

The information, representative samples of which are enclosed as Exhibit B, are documents that were the basis of communications between a Texas A&M System attorney and a university administrator, and these documents should be excepted from disclosure under section 552.107(1) of the Act. The attorney general has provided the following analysis of this exception:

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

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<sup>1</sup> The request was originally received on January 8, 2024. See Exhibit A. The system requested clarification/ narrowing of the request on January 8, 2024, after close of business, and the requestor provided clarification/narrowing on January 9, 2024. The university requested further clarification/narrowing of the request on January 11, 2024, after close of business and the requestor responded to the request on January 17, 2024, after close of business making the official date of receipt January 18, 2024. Thus, the 10th business day after receipt of this request is February 1, 2024.

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. 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.* 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).

*See, e.g.*, Tex. Att’y Gen. OR2016-02974 (2016).

We submit that the representative samples set forth in Exhibit B meet the criteria set forth above to demonstrate the elements of the attorney–client privilege necessary to withhold the correspondence in its entirety. This information constitutes communications, satisfying the first element of the privilege test. In the present matter, the information in Exhibit B consists of communications between a Texas A&M System Office of General Counsel (“OGC”) attorney, and university administrators. Specifically, the communications are among Ray Bonilla, General Counsel, OGC, Mark Welsh, President, Texas A&M University, Kelly S. Brown, Associate Vice President, Marketing & Communications, Texas A&M University, Susan Ballabina, Chief of Staff for the President, Texas A&M University, and Alan Sams, Executive Vice President and Provost, Texas A&M University. Second, the communication was sent and received expressly for the purpose of facilitating the rendition of legal services. Third, the communications were among a system attorney and university administrators. Finally, at the times this information was

Open Records Division

January 29, 2024

Page 3 of 3

communicated, it was the intent of the parties that the information is not disclosed to third persons. Subsequent to the initial communication of the information, the attorney and client recipients have maintained the confidentiality of the communications. Therefore, the information in Exhibit B is excepted from disclosure under section 552.107(1).

Thank you for your consideration of this matter. If you have any questions, please feel free to contact me.

Sincerely,



Claudene Marshall  
Assistant General Counsel

Enclosures: Exhibits A, B, C

cc: Robert Montoya (without enclosure)

TAMU Open Records