



January 25, 2001

Mr. W. Thomas Godard
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-0304

Dear Mr. Godard:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 143057.

The Texas Department of Health ("TDH") received a request for information reviewed by TDH in connection with its consideration of the Kingsville Dome and Rosita Mines Agreement (the "agreement"), to which TDH is a party. You have submitted information held by TDH that you deem to be responsive to the request. TDH claims that the information submitted as Attachments A and B is excepted from disclosure under section 552.107 of the Government Code. You also have submitted, as Attachment C, information that you inform us was provided to TDH by the Texas Natural Resource Conservation Commission ("TNRCC"). You explain that TNRCC also is a party to the agreement and that TDH received the information in Attachment C from TNRCC in the process of drafting the agreement. You also advise this office that TNRCC requested that TDH submit the information it received from TNRCC in asking for this ruling, so that TNRCC might have the opportunity to demonstrate why that information should be withheld from disclosure. TNRCC also received a request for information relating to the agreement and asked for an attorney general decision.¹ TNRCC claims, in the comments that it submitted to this office, that information which TNRCC shared with TDH is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.

With regard to the information that TNRCC provided to TDH, we initially note that information may be transferred between governmental bodies that are subject to the Public Information Act without waiving exceptions to the public disclosure of that information or

¹We assigned the TNRCC file ID# 143148.

affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). Thus, the release of information by one state agency to another state agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for those of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. *Id.* Here, TDH informs us that TNRCC transferred its information to TDH. Without asserting any exceptions to disclosure, TDH is allowing TNRCC to assert its own exceptions and arguments for withholding the transferred information. Pursuant to the interagency transfer doctrine, TNRCC has not waived its claims under sections 552.107 and 552.111 by transferring the information to TDH. Therefore, we will consider TNRCC's claimed exceptions for withholding the information that was transferred to TDH.

Next, we must consider whether TNRCC waived its claim under section 552.107 in sharing information relating to the Kingsville Dome and Rosita Mines Agreement with TDH. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Open Records Decision No. 574 (1990). Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct provides that an attorney may not reveal the confidential information of a client, including privileged information, to:

- (1) a person the client has instructed is not to receive the information; or
- (2) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(b)(1). However, Rule 1.05 also provides that "[a] lawyer may reveal confidential information ... [w]hen the lawyer has been expressly authorized to do so in order to carry out the representation." *Id.* R. 1.05(c)(1). Thus, the rules of professional conduct allow a government attorney to reveal privileged information when expressly authorized to do so by his or her governmental body while still restricting the attorney from revealing the information to unauthorized third parties. *Id.* R. 1.05(a)-(c).

The Restatement of the Law Governing Lawyers specifically addresses the circumstance in which an attorney for one government agency exchanges privileged information with another government agency. Comment c to section 74 of the Restatement states that "[c]ommunications between a lawyer representing one governmental agency and another governmental agency are privileged only if the lawyer represents both agencies ... or if the communication is pursuant to a common interest arrangement." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt.c (2000). With respect to common interest arrangements, the Restatement provides:

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such information that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Id. § 76. This section is designed to “permit[] persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers.” *Id.* cmt.b. Thus, “[c]lients . . . can elect separate representation while maintaining the privilege in cooperating on common elements of interest.” *Id.* Furthermore, comment c to section 76 provides that “[e]xchanging communications may be predicated on an express agreement, but formality is not required. It may pertain to litigation or to other matters.” *Id.* cmt.c. Therefore, under the Restatement, the attorney-client privilege is not waived when an attorney for one government agency exchanges privileged information with another government agency pursuant to a formal or informal agreement concerning a matter of interest common to both agencies. *See id.* §§ 74, 76; *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985) (“The privilege is not . . . waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication.”)).

In this specific instance, the information that TNRCC shared with TDH relates to the Kingsville Dome and Rosita Mines Agreement, a financial assurance arrangement involving a uranium mining company. Both TNRCC and TDH are parties to that agreement. Furthermore, as part of their respective regulation of radioactive waste disposal sites and sources of radiation, TNRCC and TDH adopted a memorandum of understanding (“MOU”) pursuant to sections 401.414 and 402.1512 of the Health and Safety Code. *See Health & Safety Code* §§ 401.414, 402.1512 (requiring TNRCC and TDH to adopt MOU).² The stated purpose of the MOU is to “implement and coordinate the responsibilities and define the respective duties of [TNRCC and TDH] in the regulation of sources of radiation . . . to provide a consistent approach to avoid duplication, and to delineate areas of separate jurisdiction.” 25 T.A.C. § 289.101(a). The MOU specifically addresses *in situ* uranium mining at section 289.101(f), and provides, among other things, that “[r]equirements for financial security for decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, and disposal of radioactive materials will be established jointly by the TNRCC and the TDH.” *Id.* § 289.101(f)(10). The MOU further provides that

²Section 402.1512 of the Health and Safety Code was repealed by the Seventy-fourth Legislature. *See Act of April 25, 1995, 74th Leg., R.S., ch. 76, § 11.334(f), 1995 Tex. Gen. Laws 458, 790 (repealing Health & Safety Code § 402.1512 to conform to section 1.09, ch. 15, Acts of 72nd Leg., 1st C.S., 1991).*

[i]n the event that financial security or assurances deposited in the Radiation and Perpetual Care Fund ... are required to complete decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, groundwater restoration, and disposal of radiation material, the TDH, in agreement with the TNRCC, may enter into contracts to establish these activities.

Id. § 289.101(f)(11). Finally, the MOU states that “[e]ach agency may request from the other agency short-term assistance of personnel or resources when there is a need for such assistance, such as for ... financial assurance information” *Id.* § 289.101(i).

Thus, the MOU between TNRCC and TDH explicitly authorizes TNRCC and TDH to work jointly and share information in establishing and entering into financial assurance arrangements with uranium mining licensees. Here, it appears that TNRCC shared documents with TDH in drafting the Kingsville Dome and Rosita Mines Agreement. Because this information was shared by agreement between TNRCC and TDH in cooperation on a matter of common interest, we conclude that TNRCC has not waived its claim under section 552.107 with respect to this shared information. *See* Gov’t Code § 552.107(1); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(a)-(c); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 74, 76 (2000); *cf.* Tex. R. Evid. 503(b)(1)(C).

We turn now to the specific claims of TDH and TNRCC under section 552.107(1), which excepts from public disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov’t Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging “confidential information,” this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of the Act. *See* Open Records Decision No. 574 at 4-5 (1990) (construing statutory predecessor to section 552.107(1)). Accordingly, this office has determined that section 552.107(1) protects only what rule 1.05 describes as “privileged” information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. “Unprivileged” information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8.

In this instance, TDH informs this office that the documents submitted as Attachment A “involve legal advice and/or opinions provided to TDH and TNRCC by Assistant Attorney General Hal Morris regarding certain provisions of the [a]greement.” TDH also represents to us that the documents submitted as Attachment B “involve legal advice from TDH Assistant General Counsel Tom Godard given to TDH’s Bureau of Radiation Control.” TNRCC asserts that the documents submitted by TDH as Attachment C “reflect legal advice or opinion from TNRCC attorneys directed to agency staff.” Based on these representations and our review of the information in question, we conclude that portions of that information come within the attorney-client privilege. We have marked the information in Attachments A, B, and C that TDH may withhold under section 552.107.

Lastly, we address TNRCC’s assertion of section 552.111 of the Government Code with respect to Attachment C. Section 552.111 of the Government Code excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process from public disclosure and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. -- San Antonio 1982, no writ); Open Records Decision No. 559 (1990). In Open Records Decision No. 615 (1993), this office reexamined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App. – Austin 1992, no writ). We concluded that section 552.111 excepts from required public disclosure “only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body[.]” Open Records Decision No. 615 at 5-6. Section 552.111 generally does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. However, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation that severance is impractical, factual matter also may be withheld. *See* Open Records Decision No. 313 (1982); *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169 (Tex. App. -- Austin 2001, no pet. h.).

Section 552.111 also encompasses communications between governmental entities that share a privity of interest or common deliberative process with regard to the subject of the communications. In this instance, TNRCC submits that portions of Attachment C constitute advice or opinion on matters of policy concerning financial assurance arrangement for a uranium mining company subject to the requirements of TNRCC underground injection control permits and a TDH Radioactive Material License.

As previously concluded in this ruling, TNRCC and TDH share a privity of interest with regard to the agreement to which the information in question pertains. Based on TNRCC’s statements and our review of the information at issue, we have marked information that we conclude is excepted from disclosure under section 552.111. TDH also may withhold that information from the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

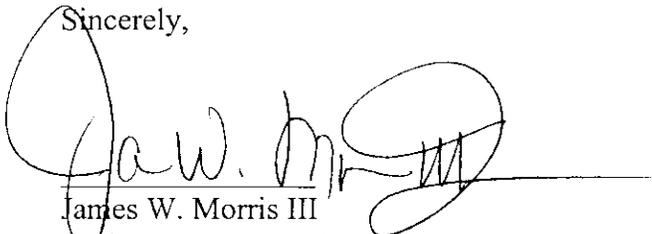
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 143057

Encl. Submitted documents

cc: Mr. Richard Lowerre
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(w/o enclosures)