



July 22, 2002

Mr. James L. Hall  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342

OR2002-4010

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165972.

The Texas Department of Criminal Justice (the "department") received a request for six categories of information related to funds appropriated by the state legislature for fiscal years 2002 and 2003 for the expansion of the InnerChange Freedom Initiative. You advise that you have released some responsive information to the requestor, and that you have no information responsive to items a, e, and f of the request.<sup>1</sup> You claim that the remaining requested information is excepted from disclosure under section 552.107 of the Government Code and Rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See Open Records Decision No. 574 (1990)*. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In *Open Records Decision No. 574 (1990)*, this office concluded that section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See id.* at 5.

You represent that most of the submitted information consists of confidential communications between the department, which is the client, and the department's attorneys

---

<sup>1</sup>The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); *Open Records Decision No. 452 at 3 (1986)*.

made for the purpose of rendering legal services to the client. You indicate that these communications reflect the legal opinions and advice of the department's general counsel to the department's board and staff, and were made to facilitate the rendition of professional legal services to the department. Upon review of your arguments and the submitted information, we conclude that this information is covered by the attorney-client privilege, and is therefore excepted from disclosure under section 552.107(1).

The submitted information also includes the opinion of the legal counsel of Prison Fellowship Ministries ("PFM") to the department's general counsel. Generally, when a governmental body shares privileged information with a third party, the governmental body is deemed to have waived the attorney-client privilege. *See* TEX. R. EVID. 511; Open Records Decision No. 630 at 4 (1994). However, you contend that the privilege applies in this instance, citing Rule 503 of the Texas Rules of Evidence, because the information was shared under the authority of an agreement between the two parties and pursuant to the parties' common interest. We agree.

Rule 503 provides in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

....

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein

TEX. R. EVID. 503(b)(1)(C).

With respect to common interest arrangements, the Restatement of the Law Governing Lawyers 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.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000). 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 one party exchanges privileged information with another party pursuant to a formal or informal agreement concerning a matter of interest common to both parties. *See id.* §§ 74, 76; *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Gov’t*, 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.”)).

You state that the department has a contractual agreement with PFM under which PFM provides the InnerChange program to the department. You advise that the legal opinion from PFM’s counsel is privileged because of a common interest between PFM and the department. Because this information was shared between the department and PFM in cooperation on a matter of common interest, we find that the communication is privileged under section 552.107. *See* Gov’t Code § 552.107(1); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(c)(1) (a lawyer may reveal confidential information when the lawyer has been expressly authorized to do so in order to carry out the representation); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 74, 76 (2000); TEX. R. EVID. 503(b)(1)(C). We therefore conclude that the department may withhold the legal opinion from PFM’s attorney under section 552.107.

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

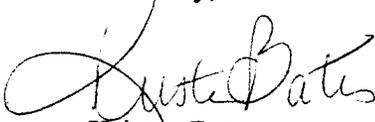
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 165972

Enc. Submitted documents

c: Mr. Alex J. Luchenitser  
Americans United for Separation of Church and State  
518 C Street, N.E.  
Washington, D.C. 20002  
(w/o enclosures)