



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 18, 2003

Ms. Cynthia Villarreal-Reyna
Section Chief
Legal & Compliance Div
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-4220

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182992.

The Texas Department of Insurance (the "department") received a written request for certain records pertaining to the department's appointment of a special deputy receiver of Amcare Health Plans of Texas ("Amcare"). You state that most of the responsive information will be released to the requestor. You contend, however, that some of the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.107(1), 552.111, and 552.137 of the Government Code. Also, you have submitted to this office a proposal received by the commission in connection with the appointment process. You do not contend that the submitted proposal is excepted from required public disclosure; rather, you request a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or proprietary interest in the information to submit their own arguments as to why the requested information should be withheld from the public.

You first seek to withhold certain e-mail communications between staff attorneys and other department personnel pursuant to section 552.107(1) of the Government Code. Section 552.107(1) 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 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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).

Based on your representations and our review of the submitted documents, we conclude that you have met your burden of establishing that the submitted e-mail communications constitute privileged attorney-client communications for purposes of section 552.107(1). Accordingly, the department may withhold these documents in their entirety pursuant to section 552.107(1).

You next contend that three intra-office memoranda, a “Request for Commissioner’s Action,” and the score sheets of the committee evaluating the bids for appointment of a special deputy receiver are excepted from public disclosure pursuant to section 552.111 of the Government Code, which excepts from required public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 5 (1993).

The submitted internal memoranda and score sheets appear to consist of information upon which the department based its decision to appoint a special deputy receiver of Amcare. Assuming that the department has not previously released any portion of these documents

to the public, we conclude that the department may withhold the memoranda and score sheets in their entirety pursuant to section 552.111. However, because the "Request For Commissioner's Action" consists solely of factual information, we conclude that this document must be released to the requestor.

Finally, you have also submitted to this office as responsive to the records request a proposal submitted to the department in connection with the process of appointing a special deputy receiver of Amcare. Because the proposal was stamped "confidential," you have sought a decision from this office in accordance with section 552.305 of the Government Code, which permits governmental bodies to rely on interested third parties having a privacy or property interest in requested information to raise and explain the applicability of exceptions to required public disclosure. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

In accordance with section 552.305(d), the department notified representatives of Jack M. Webb & Associates, Inc. ("Webb") of the records request and of their right to submit arguments to this office as to why the proposal should not be released to the public. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990). This office did not receive a response from Webb indicating that it wished to have any portion of the proposal withheld from the public. Therefore, this office has no basis for concluding that Webb has a privacy or proprietary interest in this information. Consequently, the department must release the proposal to the requestor in its entirety, except for the following information.

We note that the proposal contains an e-mail address of a member of the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that the department has received an affirmative consent to the release of the e-mail address contained in the proposal. Thus, the department must withhold the e-mail address contained in the proposal pursuant to section 552.137.

In summary, the department may withhold the submitted e-mail communications pursuant to section 552.107(1). Under section 552.111, the department may withhold the submitted internal memoranda and score sheets to the extent the information contained therein has not

been previously released to the public. The department must release the "Request For Commissioner's Action." Also, the submitted proposal must be released, except for the private e-mail address, which the department must withhold pursuant to section 552.137.

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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/RWP/sdk

Ref: ID# 182992

Enc: Submitted documents

c: Mr. Robin K. Dodds
505 West 7th Street, #108
Austin, Texas 78701
(w/o enclosures)

Mr. Robert Loiseau
Webb & Associates, Inc.
2508 Ashley Worth Boulevard, Suite 100
Austin, Texas 78738
(w/o enclosures)