



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 5, 2004

Ms. Ruth H. Soucy  
Manager, Open Records Division  
Controller of Public Accounts  
P. O. Box 13528  
Austin, Texas 78711-3528

OR2004-0875

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195863.

The Comptroller of Public Accounts (the "comptroller") received a request for communications with any person or entity regarding Cap Rock Energy Corporation, Cap Rock Electric Cooperative, Inc., or the Cap Rock Energy Corporation's Shareholders' Trust (collectively, "Cap Rock"). You inform this office that the requestor verbally modified his request to exclude confidential taxpayer information regarding other entities, and to limit the period of communications sought to two years. You state that you have released most of the requested information to the requestor, redacted according to the requestor's verbal modification. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by the requestor, who is a representative of Cap Rock, and from an attorney with the Office of Public Utility Counsel ("OPC"). *See*

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<sup>1</sup>Although you also initially raise section 552.101 of the Government Code as an exception to disclosure, you did not submit to this office written comments stating the reasons why section 552.101 would allow the information to be withheld. Thus, we assume that you no longer claim this exception. *See* Gov't Code §§ 552.301, .302.

Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the comptroller's obligations under section 552.301 of the Government Code. You acknowledge that the comptroller has not sought an open records decision from this office within ten business days, nor provided this office with the required documents within fifteen business days, as prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977).

You assert that the submitted information is excepted from disclosure under sections 552.107 and 552.111. These exceptions generally do not constitute compelling reasons to withhold information. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). However, this office held in Open Records Decision No. 676 that “a compelling reason under section 552.302 may be demonstrated for attorney-client privileged communications *if it is shown that the release of the information would harm a third party.*” Open Records Decision No. 676 at 11-12 (2002) (emphasis in original). This office further stated that “[w]hen section 552.302 is triggered, the governmental body carries the burden of demonstrating a compelling reason, and this office must decide the issue on a case-by-case basis.” *Id.* at 12. Likewise, this office also held that “a compelling reason under section 552.302 may be demonstrated for work product *if it is shown that the release of the information would harm a third party.*” Open Records Decision No. 677 at 10 (2002) (emphasis in original). In this case, you assert that release of the submitted information would harm OPC. Thus, we will consider your arguments.

You assert that the submitted information is protected by the attorney-client privilege under section 552.107(1) of the Government Code. 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). 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 Texas 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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)(A), (B), (C), (D), (E). 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. Finally, 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 the definition of a confidential communication 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).

Rule 503 of the Texas Rules of Evidence specifically provides that a client has the 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 a lawyer or a representative of a lawyer representing another party in pending action and *concerning a matter of common interest therein*. *See* TEX. R. EVID. 503(b)(1)(C). In addition, rule 1.05 of the Texas Disciplinary Rules of Professional Conduct 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 party. 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.

Restatement (Third) of the Law Governing Lawyers § 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.”)).

The attorney for OPC states that OPC and the comptroller exchanged information related to a case before the Public Utility Commission, styled *Application of Cap Rock Electric Cooperative, Inc. to Transfer its Certificate of Convenience and Necessity to the Cap Rock Energy Corporation*, P.U.C. Docket No. 24577, to which OPC is a party, and in which the comptroller, through its authority under chapter 74 of the Property Code to conduct unclaimed property audits, also has an interest. The attorney for OPC further explains that the communications exchanged between OPC and the comptroller relate to a “matter of common interest [regarding Cap Rock’s shareholder trust] in accordance with Texas Rule of Evidence 503(b)(1)(C).” Furthermore, OPC represents that the communications concerning the matter of common interest between itself and the comptroller were made for the purpose of facilitating the rendition of professional legal services. After carefully reviewing the arguments submitted by OPC and the comptroller, and the information submitted by the comptroller, we agree that some of this information constitutes privileged attorney-client communications that may be withheld under section 552.107 of the Government Code.

The comptroller waived its claims of sections 552.107 and 552.111 by failing to comply with section 552.301 of the Government Code in requesting this ruling. However, because OPC has a compelling interest, and has not waived its claim of attorney-client privilege, we have marked the privileged OPC communications that fall under section 552.107. We note that attorney-client communications between representatives of the comptroller that do not reflect privileged OPC communications are not excepted under section 552.107. Thus, the comptroller must withhold only the information we have marked pursuant to section 552.107. The remaining submitted information must be released. Because our ruling is dispositive, we need not address any remaining arguments.

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,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 195863

Enc. Submitted documents

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