



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2006

Ms. Lisa Villarreal
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2006-14649

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 267083.

The Office of the Attorney General (the "OAG") received a request for information pertaining to the Assurance of Voluntary Compliance State Farm Mutual Automobile Insurance Company ("State Farm") reached with the OAG concerning the branding of vehicle titles. The OAG has released some information and asserts the remaining information is excepted from disclosure under sections 552.107, 552.111, 552.117, and 552.137 of the Government Code.¹ We have considered the OAG's arguments and have reviewed the submitted sample of information.² In addition, we have received and

¹The OAG asserts the information is protected under section 552.101 of the Government Code in conjunction with the attorney-client privilege pursuant to Texas Rule of Evidence 503 and the work product privilege pursuant to Texas Rule of Civil Procedure 192.5. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass the discovery privileges found in these rules because they are not constitutional law, statutory law, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this

considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding release of requested information).

Section 552.107(1) protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* 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. 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. *See 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).

The OAG explains the communications in Exhibits B - C and the handwritten notes it marked in Exhibit D are confidential communications among OAG attorneys and the staff that were made in furtherance of the rendition of professional legal services. The OAG states these communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG's arguments and the submitted information, we agree

office.

that Exhibits B - C and the handwritten notes it marked in Exhibit D constitute privileged attorney-client communications that the OAG may withhold under section 552.107. Because section 552.107 is dispositive, we do not address the OAG's other arguments for Exhibits B - C and the handwritten notes it marked in Exhibit D.

Next, the OAG contends the private e-mail address it marked in Exhibit D is excepted from disclosure under section 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The OAG states the individual has not affirmatively consented to the release of the e-mail address in Exhibit D. We agree the OAG must withhold the private e-mail addresses it and we have marked pursuant to section 552.137.

In addition, the OAG has marked two phone numbers that it asserts are protected under section 552.117. Section 552.117(a)(1) excepts from disclosure the home telephone numbers of employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The OAG explains the employees made requests for confidentiality under section 552.024 prior to the date on which the request for this information was made. One of the phone numbers, which we have marked, is a work telephone number, and therefore, is not confidential under section 552.117(a)(1). If the other phone number is in fact the employee's home or personal cellular telephone number, then the OAG must withhold it pursuant to section 552.117(a)(1). Otherwise, the OAG must release this telephone number also.

Lastly, the OAG states because State Farm may have an interest in withholding Exhibit D, it notified State Farm of the request pursuant to section 552.305 of the Government Code, Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *Open Records Decision No. 542 (1990)* (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). State Farm asserts some of the information in Exhibit D is confidential under sections 552.101 and 552.110 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. State Farm contends it need not disclose three sets of documents pursuant to section 751.251 of the Insurance Code. Section 751.251 provides "an insurer may not be compelled to disclose a self-audit document or waive any statutory or common law privilege." Ins. Code § 751.251(b). A "self-audit document" is "a document that is prepared as a result of or in connection with an insurance compliance audit." *Id.* 751.251(c). State Farm informs this office it conducted a self-audit of its compliance with

state titling laws in 2002. After review of the documents State Farm seeks to withhold, we agree they are self-audit documents State Farm prepared as a result of or in connection with an insurance compliance audit. We have marked the documents the OAG must withhold under section 751.251. Because section 751.251 is dispositive, we do not address State Farm's section 552.110 assertion.

In summary, the OAG may withhold Exhibits B - C and the handwritten notes it marked in Exhibit D from disclosure under section 552.107 and must withhold the private e-mail addresses it and we marked in Exhibit D under section 552.137. The OAG must withhold one of the telephone numbers it has marked under section 552.117(a)(1) if it is in fact the employee's home or personal cellular telephone number. The OAG must also withhold the documents we marked under section 751.251 of the Insurance Code and release the rest of Exhibit D.

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).

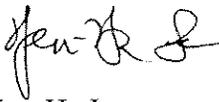
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 265155

Enc: Marked documents

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