



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 28, 2006

Mr. Brett Norbraten  
Open Records Attorney  
Texas Department of Aging and Disability Services  
P. O. Box 149030  
Austin, Texas 78714-9030

OR2006-03069

Dear Mr. Norbaten:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 244952.

The Texas Department of Aging and Disability Services (the "department") received a request for "all e-mails, memos, letters, notes, calendar entries or other forms of written communication concerning federally mandated compliance, such as HIPAA, regarding privacy and security issues to or from [seven named] individuals" beginning August 1, 2005 through January 4, 2006. You claim that the information you have submitted in Exhibits A and B is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. You claim that the information you have submitted in Exhibits C and D is not subject to the Act or, alternatively, that this information is excepted from disclosure under section 552.139 of the Government Code. Additionally, you indicate that you notified Texas Medicaid and Health Care Partnership ("TMHP") of the request and their opportunity to submit comments to this office regarding whether some of the submitted information is subject to TMHP's proprietary interests. See 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 section 552.305 permits governmental body to rely on interested third party to raise and

explain applicability of exception to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that 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). As of the date of this letter, TMHP has not submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes TMHP's proprietary information, and none of it may be withheld on that basis. *See, e.g., Id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We now address the arguments the department has raised for the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 595.001 of the Health and Safety Code, which provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004." Health & Safety Code § 595.001. You state that the submitted complaint in Exhibit A "identifies the identity and location of a person receiving services as a [department] client at a facility in Lubbock and its provision of mental retardation services to the person." You further state that the requestor has not demonstrated that she has a right of access to the complaint at issue under any provision of the Health and Safety Code. Having considered your representations and reviewed the submitted complaint, we conclude that the complaint is confidential in its entirety under section 595.001 of the Health and Safety Code. Accordingly, the department must withhold the complaint we have marked in Exhibit A under section 552.101 of the Government Code as information made confidential by law.<sup>2</sup>

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<sup>1</sup>We assume that the 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 office.

<sup>2</sup>As our ruling on this issue is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.107(1) of the Government Code 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). We note the attorney-client 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). 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. 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. *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).

You assert the remaining submitted information in Exhibit A and all the submitted information in Exhibit B is protected by the attorney-client privilege. You state that this information consists of e-mails “between and among department attorneys, executives and employees [that] constitutes communications made for the purpose of rendering professional legal services to the department and its executive staff.” You also represent that the confidentiality of this submitted information has been maintained. Based on your representations and our review of the information at issue, we agree that the department may withhold the remaining submitted information in Exhibit A and all the submitted information in Exhibit B pursuant to section 552.107.

You claim that the information submitted in Exhibits C and D is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information." See Gov't Code § 552.021. However, in Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in this decision and our review of the information at issue, we agree that the following submitted information in Exhibits C and D does not constitute public information under section 552.002 of the Government Code: user names, passwords, and internal department uniform resource locators ("URLs") used for testing computer programming. Accordingly, this information, which we have marked, is not subject to the Act and need not be released to the requestor. However, we determine that the remaining information in Exhibits C and D is subject to the Act; therefore, we will address your arguments under section 552.139 of the Government Code for this information.

You claim that the remaining submitted information in Exhibits C and D is excepted under section 552.139 of the Government Code, which provides:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. You claim the information in Exhibits C and D "reveals the mechanisms by which the [department's computer] network is kept secure and access is given." You argue that Exhibits C and D "reveals information about the design, operation, and defense of the [department's] computer network by discussing the programs and methodologies used to ensure the security of an employee-only server." However, based on our review of this information, we find that only Exhibit D is excepted from disclosure by section 552.139.

In summary, the marked complaint in Exhibit A must be withheld under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code. The remaining submitted information in Exhibit A and all the submitted information in Exhibit B may be withheld under section 552.107 of the Government Code. We have marked the information in Exhibit C that is not subject to the Act and need not be released to the requestor. Exhibit D must be withheld under section 552.139 of the Government Code. The remaining submitted information must be released.

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,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/krl

Ref: ID# 244952

Enc. Submitted documents

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