



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2006

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2006-10466

Dear Ms. Alexander:

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# 258888.

The Texas Department of Transportation (the "department") received a request for (1) information relating to corruption, misappropriation, or similar types of misconduct involving department employees or contract workers during a specified time interval; and (2) the comprehensive balance of all department accessible accounts as of the date of the request. You indicate that prior open records letter rulings are applicable to some of the requested information. You state that the department has released the requested comprehensive balances information to the requestor. You have submitted a representative sample of information that you claim is excepted from disclosure under sections 552.107, 552.111, 552.116, and 552.117 of the Government Code. We have considered your arguments and have reviewed the submitted information.¹

Initially, we address your statement that the present request for information involves some of the same subject matter as the requests that resulted in Open Records Letter Nos. 2006-00107 (2006), 2006-01432 (2006), and 2006-06334 (2006). You state that the prior rulings

¹ This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

address the public availability of some of the information that is responsive to the present request. You do not inform us of any change in the relevant law, facts, and circumstances on which the prior rulings are based. Therefore, to the extent that Open Records Letter Nos. 2006-00107, 2006-01432, or 2006-06334 encompasses any information that is responsive to the present request, the department must dispose of any such information in accordance with the prior rulings. See Gov't Code § 552.301(a); Open Records Letter Nos. 2006-00107 (2006) (concluding that the marked employee information must be withheld under section 552.117 of the Government Code, and that other portions of the requested information may be withheld under sections 552.103, 552.111, and 552.116 of the Government Code), 2006-01432 (2006) (concluding that the marked employee information must be withheld under section 552.117 of the Government Code if the employee at issue timely requested confidentiality for the information under section 552.024, and that a portion of the information may be withheld under section 552.116 of the Government Code), 2006-06334 (2006) (concluding that the requested audit working papers may be withheld under section 552.116 of the Government Code); see also Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under section 552.301(a)). To the extent that the prior rulings are not applicable to the information that is responsive to the present request, we will address your claimed exceptions to disclosure.

Section 552.107(1) of the Government Code 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 Tex. 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).

You state that the information in Exhibit D is a communication between an attorney for the department and a department employee that was made for the purpose of facilitating the rendition of professional legal services. You indicate that this information has not been shared with or distributed to others. Based on your representations and our review of the information at issue, we conclude that the department may withhold the information in Exhibit D under section 552.107(1).²

Next, we address your claim under section 552.116 of the Government Code, which provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

²As our ruling is dispositive for this information, we need not address your claim under section 552.111 of the Government Code.

Gov't Code § 552.116. You state that the information submitted as Exhibit B consists of audit working papers. You inform us that this information relates to audits performed by internal auditors of the department under the authority of chapter 2102 of the Government Code and other state law. You also state that the final audit reports will be released. Based on your representations and our review of the information at issue, we conclude that the department may withhold all of the information in Exhibit B under section 552.116.

Lastly, we address section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee of a governmental body who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information.

You inform us that the employees at issue timely elected to keep their information confidential under section 552.024. As such, the department must withhold the information you have marked, as well as the additional information we have marked, in Exhibit C under section 552.117(a)(1).

In summary, the department may withhold the information in Exhibit D under section 552.107(1) of the Government Code and the information in Exhibit B under section 552.116 of the Government Code. The department must withhold the marked information in Exhibit C under section 552.117(a)(1) of the Government Code. The remaining information must be released to the requestor.

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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 258888

Enc. Submitted documents

c: Mr. Sal Costello
10300 Dalea Vista Court
Austin, Texas 78738
(w/o enclosures)