



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2006

Mr. Robert R. Flores
Attorney
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

OR2006-11592

Dear Mr. Flores:

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# 261004.

The Texas Water Development Board (the "board") received a request for (1) information relating to employees of the board who earn \$80,000.00 or more annually; (2) records relating to the hiring of certain employees; (3) the requestor's personnel file; (4) a contract with a named individual; and (5) information relating to deputy executive administrators. You inform us that the requestor no longer seeks access to some of the information. You also inform us that some of the requested information no longer exists.¹ You state that the board will release some of the requested information. You also state that the board will redact social security numbers from responsive records under section 552.147 of the Government Code.² You have submitted information that the board seeks to withhold under

¹ We note that the Act does not require the board to release information that did not exist when it received this request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

² Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503.³ You also indicate that some of the requested information is the subject of prior open records letter rulings. We have considered your arguments and have reviewed the submitted information.⁴

You indicate that some of the requested information is the subject of Open Records Letter Nos. 2004-9871 (2004) and 2005-02744 (2005). Provided that there has been no change in the law, facts, and circumstances on which the previous rulings are based, the board must dispose of any requested information that is encompassed by Open Records Letter Nos. 2004-9871 and 2005-02744 in accordance with those rulings. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that you did not claim the protection of sections 552.103 and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5 within the ten-business-day period prescribed by section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(b), 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). Sections 552.103 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Likewise, the attorney work product privilege under rule 192.5 may be waived. *See* Open Records Decision No. 677 at 10 (2002). The board waived sections 552.103 and 552.111 and rule 192.5 in failing to claim those provisions within the deadline prescribed by section 552.301(b). Therefore, the board may not withhold any of the submitted information under section 552.103, section 552.111, or rule 192.5.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the information submitted as Exhibit D consists of a completed investigation

³ We note that section 552.022 of the Government Code, which you also claim, is not an exception to disclosure. Section 552.022 provides for the required public disclosure of eighteen categories of information unless the information is expressly confidential by law or, in the case of information encompassed by section 552.022(a)(1), excepted from disclosure under section 552.108. *See* Gov't Code § 552.022(a)(1)-(18),

⁴ We note that the documents submitted as Exhibits D and J also were submitted as Exhibits B and C to the letter dated August 1, 2006, in which you requested this decision.

made for the board. Therefore, Exhibit D must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or confidential under other law. You do not claim an exception to disclosure under section 552.108. Although you seek to withhold Exhibit D under section 552.107, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the board may not withhold any of the information in Exhibit D under section 552.107.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, which you claim under section 552.107, also is found at Texas Rule of Evidence 503. Accordingly, we will address your claim under rule 503 with regard to Exhibit D. Additionally, we will consider your claims under sections 552.101 and 552.107 of the Government Code with respect to the submitted information that is not subject to section 552.022.

Rule 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a 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 the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that Exhibit D is a communication between an attorney for and client representatives of the board that was made for the purpose of facilitating the rendition of professional legal services. You also state that Exhibit D was not intended for disclosure to third parties and remains confidential. Based on your representations and our review of the information in question, we conclude that the board may withhold Exhibit D under Texas Rule of Evidence 503. *See also Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court also held that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* You state that Exhibit N identifies "a complainant/witness in [a] sexual harassment complaint." We conclude that the board must withhold the name of the

complainant/witness under section 552.101 of the Government Code in conjunction with common-law privacy under *Ellen*.

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 seek to withhold Exhibits E, F, G, H, I, J, K, L, and M under section 552.107(1). You state that these exhibits also consist of communications between attorneys for the board and their clients that were made in connection with the rendition of professional legal services. You also state that these communications were not intended for disclosure to third parties and remain confidential. Based on your representations and our review of the information in question, we conclude that the board may withhold Exhibits E, F, G, H, I, J, K, L, and M under section 552.107(1) of the Government Code. Although you also seek to withhold the remaining information in Exhibit N under section 552.107(1), you do not indicate either that

Exhibit N is an attorney-client communication or that it was made in connection with the rendition of professional legal services. We therefore conclude that the board may not withhold the remaining information in Exhibit N under section 552.107(1).

In summary: (1) provided that there has been no change in the law, facts, and circumstances on which the previous rulings are based, the board must dispose of any requested information that is encompassed by Open Records Letter Nos. 2004-9871 and 2005-02744 in accordance with those rulings; (2) the board may withhold Exhibit D under Texas Rule of Evidence 503; (3) the board must withhold the name of the sexual harassment complainant/witness in Exhibit N under section 552.101 of the Government Code in conjunction with common-law privacy under *Ellen*; and (4) the board may withhold Exhibits E, F, G, H, I, J, K, L, and M under section 552.107(1) of the Government Code. The rest of the 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).

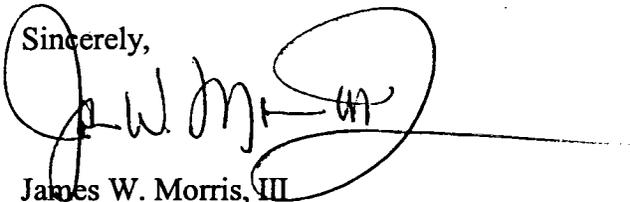
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 261004

Enc: Submitted documents

c: Mr. Warren N. Rose
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(w/o enclosures)