



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 3, 2006

Mr. David L. Griffis  
Crain, Caton & James, P.C.  
Five Houston Center  
1401 McKinney Street, 14<sup>th</sup> Floor  
Houston, Texas 77010-4035

OR2006-13042

Dear Mr. Griffis:

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# 262569.

Oiltanking Houston, L.P. ("Oiltanking") received a request for all records associated with permit #07372 and new construction permit #06-NC-232. You state that all responsive information has been or will be timely forwarded to the requestor except for responsive information that falls within exceptions of the Act. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, Oiltanking asks about the extent to which the Act applies to this request.<sup>2</sup> Therefore, we consider whether the information Oiltanking has submitted is subject to the Act. Section 552.0037 of the Government Code provides:

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<sup>1</sup>You also claim that the submitted information contained in this document is excepted under section 552.101 of the Government Code in conjunction with the attorney-client privilege rules found in the Texas Rules of Evidence and the Texas Disciplinary Rules of Professional Conduct. However, section 552.101, which excepts from disclosure information deemed confidential under other law, does not incorporate the attorney-client privilege. *See* Open Records Decision No. 575 at 2 (1990) (stating that statutory predecessor to section 552.101 does not encompass discovery privileges). The proper exception to raise when claiming attorney-client privilege is section 552.107 of the Government Code. ORD No. 575; Gov't Code § 552.107. Accordingly, we address your claim of attorney-client privilege under section 552.107.

<sup>2</sup>We note that the Opinion Committee of the Office of the Attorney General will be issuing an opinion regarding the applicability of section 552.0037 of the Government Code in response to Representative Frank J. Corte's request for an opinion. *See* RQ-0455-GA.

Notwithstanding any other law, information collected, assembled, or maintained by an entity that is not a governmental body but is authorized by law to take private property through the use of eminent domain is subject to this chapter in the same manner as information collected, assembled, or maintained by a governmental body, but only if the information is related to the taking of private property by the entity through the use of eminent domain.

Gov't Code § 552.0037. Under section 552.0037, information related to the taking of private property through the use of eminent domain by an entity that is not a governmental body is subject to the Act. You state that Oiltanking is not a governmental body but is authorized by law to take private property through the use of eminent domain. *See* Nat. Res. Code § 111.019 (right of eminent domain for common carriers). You further state, and provide a copy of the Plaintiff's Original Petition For Condemnation indicating, that the submitted information pertains to an eminent domain proceeding that is currently pending in the Harris County Court at Law Number Four, styled Cause No. 869,692. Based upon your representations and review of the submitted information, we find that the information at issue is subject to the Act. Accordingly, we will address your arguments against disclosure.

Next, we note that you have submitted some information that was created after the request was received. This information, which we have marked, is thus not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and Oiltanking is not required to release that information in response to the request.

We now address your arguments for the remaining submitted information. Section 552.107 of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, the proponent maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Cf.* Open Records Decision No. 676 at 6-7 (2002). First, a proponent must demonstrate that the information at issue constitutes or documents a communication. *Cf. id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client. *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. *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 a capacity other than that of attorney). 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 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 proponent 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, *see id.* 503(b)(1), meaning that 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 proponent must explain that the confidentiality of the communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected from disclosure by the attorney-client privilege, unless otherwise waived by the proponent. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You inform us that the information at issue reflects confidential communications exchanged between employees of and attorneys for Oiltanking made in furtherance of the rendition of legal services. Based on your representations and our review of the information at issue, we conclude that Oiltanking may withhold the information at issue pursuant to section 552.107 of the Government Code.<sup>3</sup>

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).

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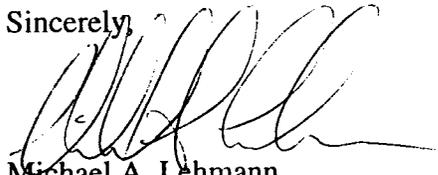
<sup>3</sup>As this ruling is dispositive, we need not address your remaining argument.

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,



Michael A. Lehmann  
Assistant Attorney General  
Open Records Division

MAL/krl

Ref: ID# 262569

Enc. Submitted documents

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