



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 1, 2007

Mr. Brian White  
Counsel for Policy Development  
Office of Injured Employee Counsel  
7551 Metro Center Drive Suite 100 MS-50  
Austin, Texas 78744

OR2007-09734

Dear Mr. White:

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# 285403.

The Office of Injured Employee Counsel (the "OIEC") received a request for e-mails sent to or received by a former OIEC employee. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Because section 552.107 of the Government Code is the more inclusive exception you claim, we address that section first. 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 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 contend that an attorney-client relationship exists between OIEC regional staff attorneys and ombudsmen pursuant to section 404.103 of the Labor Code, which provides in part that “[t]he [OIEC] public counsel shall assign staff attorneys . . . to supervise the work of the ombudsman program and advise ombudsmen in providing assistance to claimants and preparing for informal and formal hearings.” Labor Code § 404.103(b). You state that the submitted documents marked with purple flags are communications between staff attorneys and ombudsmen that were made in connection with the rendition of professional legal services. You also state that the OIEC has maintained the confidentiality of the communications. Based on your representations and our review of the information at issue, we conclude that the OIEC may withhold the purple-flagged documents under section 552.107(1).

You also raise section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. You contend that some of the remaining information is confidential under section 404.111 of the Labor Code, which provides in part:

- (a) The [OIEC] may access information from an executive agency that is otherwise confidential under a law of this state if that information is necessary for the performance of the duties of the [OIEC], including information made confidential under:

...

(4) Sections 402.083, 402.091, and 402.092 of [the Labor Code].

...

(c) The [OIEC] may not make public any confidential information provided to the [OIEC] under this chapter.[]

(d) Information collected or used by the [OIEC] under this chapter is subject to the confidentiality provisions and criminal penalties of:

...

(4) Section 402.091 of [the Labor Code].

Labor Code § 404.111(a), (c), (d); *see also id.* § 404.002 (establishing OIEC). Section 402.083 of the Labor Code provides in part that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers’ Compensation of the Department of Insurance (the “division”)] except as provided by this subtitle.” *Id.* § 402.083(a). Section 402.091 of the Labor Code makes it a criminal offense to “knowingly, intentionally, or recklessly publish[], disclose[], or distribute[] information that is confidential under [section 402.083] to a person not authorized to receive the information directly from the division.” *Id.* § 402.091(a).

This office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 6 (1993). Prior decisions of this office have found that information revealing the date of injury, as well as an injured employee’s name, beneficiary name, commission claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore confidential under section 402.083.<sup>1</sup> Only in those cases where release of the employer’s identity would reveal the claimant’s identity may the identity of an employer be withheld.

You state that some of the remaining documents contain claimant information obtained from the division that is confidential under section 402.083. You have marked that information. Based on your representations and our review of the remaining documents, we agree that the marked information is confidential under section 402.083. We therefore conclude that the

---

<sup>1</sup>The “commission” refers to the former Workers’ Compensation Commission, the predecessor agency of the Division of Workers’ Compensation of the Department of Insurance, which was established under House Bill 7, 79<sup>th</sup> Legislature, R.S. (2005).

OIEC must withhold the marked information under section 552.101 of the Government Code in conjunction with section 404.111(c) of the Labor Code. We note that the remaining documents appear to contain other confidential claimant-identifying information that must also be withheld on this basis. Therefore, to the extent that the remaining documents contain any other information obtained from the division that explicitly or implicitly identifies a workers' compensation claimant, including a claimant's date of injury, name, beneficiary name, claim number, social security number, home telephone number, home address, or date of birth, any such information must also be withheld under section 552.101 in conjunction with section 404.111(c).

In summary: (1) the OIEC may withhold the purple-flagged documents under section 552.107(1) of the Government Code; and (2) the OIEC must withhold the claimant-identifying information that you have marked in the remaining documents, as well as any other remaining information obtained from the division that explicitly or implicitly identifies a workers' compensation claimant, under section 552.101 of the Government Code in conjunction with section 404.111(c) of the Labor Code. The rest of the submitted information must be released.

You also ask this office to issue a previous determination that would permit the OIEC to withhold information under section 552.107(1) of the Government Code and under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code without the necessity of again requesting a decision under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). We decline to issue such a decision at this time. 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

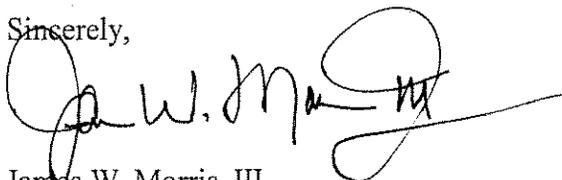
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 flourish extending to the right.

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

JWM/ma

Ref: ID# 285403

Enc: Submitted documents

c: Ms. Jeanie Cupit  
15518 Cloud Top  
San Antonio, Texas 78248  
(w/o enclosures)