



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 27, 2007

Mr. Michael Greenberg  
Assistant General Counsel  
Texas Department of State Health Services  
1100 West 48<sup>th</sup> Street  
Austin, Texas 78756

OR2007-16991

Dear Mr. Greenberg:

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# 298367.

The Texas Department of State Health Services (the "department") received a request for "copies of the investigatory files for all complaints filed from January 1, 2002, to the present regarding lasers, laser registration, and/or the use of lasers."<sup>1</sup> You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.136, and 552.137 of the Government Code. Additionally, while you raise section 552.110 of the Government Code as a possible exception to disclosure for the requested information, you make no arguments and take no position regarding the applicability of this exception. Instead, you state that the request may involve third party proprietary interests and provide documentation showing that you notified Harmonix of Texas LP ("Harmonix"); Allure Laser Spa ("Allure"); Renaissance Laser Hair Removal ("Renaissance"); Samnani Corp ("Samnani"); and Advanced Hair Solutions ("Advanced") of the request for information and of their opportunity to submit comments to this office. 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

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<sup>1</sup>The requestor states that her request does not include the name or identifying information of any complaining witness or medical records. Any of this information within the requested documents is therefore non-responsive to the present request. Our ruling does not address this non-responsive information, and the department need not release it in response to the request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

circumstances). We have considered the submitted arguments and reviewed the submitted information.<sup>2</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, we have not received comments from Harmonix, Allure, Renaissance, Samnani, or Advanced explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the requested information constitutes these parties' proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See 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).

Next, we will address your claim that some of the requested information is excepted from disclosure pursuant to federal law. You state that the United States Food and Drug Administration (FDA) contracts with the department to conduct inspections under authority of federal law and that the inspections are conducted by department employees who are commissioned officers of the FDA. You inform this office that the inspection reports created by the department are then submitted to the FDA. You assert that the FDA has informed the department that the reports and any information obtained from the inspections are confidential pursuant to 21 U.S.C. § 301 and 21 U.S.C. § 331(j). These provisions provide that the Federal Food, Drug, and Cosmetic Act prohibits the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. You also refer to section 20.85, title 21, of the Code of Federal Regulations, which states:

Any Food and Drug Administration records otherwise exempt from public disclosure may be disclosed to other Federal government departments and agencies, except that trade secrets and confidential commercial or financial information prohibited by 21 U.S.C. § 331(j), 42 U.S.C. § 263g(d) and 42 U.S.C. § 263i(e) may be released only as provided by those sections. Any disclosure under this section shall be pursuant to a written agreement that the record shall not be further disclosed by the other department or agency except with the written permission of the Food and Drug Administration.

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<sup>2</sup>We assume that the "representative 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.

21 C.F.R. § 20.85. You assert that these federal provisions also prohibit this office from reviewing any documents that may be responsive to this request. Since you have not provided this office the documents at issue for review, we are unable to make any determination regarding such documents.

You assert that some of the submitted information is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information that falls 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. *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. *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)-(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). This means the communication 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 explain that portions of the information you have marked consist of communications between department attorneys and “upper echelon” department employees made for the purpose of facilitating the rendition of professional legal services. You also indicate that the confidentiality of these communications has been maintained. Based on your arguments and our review of this information, we agree that this information consists of privileged attorney-

client communications that the department may withhold under section 552.107 of the Government Code.<sup>3</sup>

Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). The department must withhold the account and routing numbers we have marked under section 552.136 of the Government Code. However, we find that you have failed to explain how the I.T. and consignee numbers you have marked constitute access device numbers for purposes of section 552.136. *See id.* 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Thus, the I.T. and consignee numbers you have marked may not be withheld under section 552.136 of the Government Code.

The department asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The types of e-mail addresses listed in section 552.137(c) may not be withheld under section 552.137. Likewise, this section is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the remaining documents. Therefore, the department must withhold the e-mail addresses you have marked, in addition to those that we have marked, under section 552.137.

We note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the department may withhold the information you have marked under section 552.107 of the Government Code. The department must withhold the information we have marked under section 552.136 of the Government Code as well as the marked e-mail addresses under section 552.137 of the Government Code. The remaining information

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

must be released, but any copyrighted information may only be released in accordance with copyright law.<sup>4</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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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.

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<sup>4</sup>We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code 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.

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,

*Paige Savoie*

Paige Savoie  
Assistant Attorney General  
Open Records Division

PS/ma

Ref: ID# 298367

Enc. Submitted documents

c: Ms. Laura Diamond  
Riggs & Aleshire  
700 Lavaca, Suite 920  
Austin, Texas 78701  
(w/o enclosures)

Harmonix of Texas, LP  
d/ba/a Harmonix Hair & Skin Clinic  
8600 Preston Road, Suite 121  
Plano, Texas 75024  
(w/o enclosures)

Allure Laser Spa  
3901 Medical Parkway, Ste. 300  
Austin, Texas 78756  
(w/o enclosures)

Renaissance Laser Hair Removal  
11611 Preston Road, Suite #128  
Dallas, Texas 75240  
(w/o enclosures)

Samnani Corp  
5736 White Settlement Road  
Fort Worth, Texas 76108  
(w/o enclosures)

Advanced Hair Solutions  
5220 Spring Valley Road, Suite 615  
Dallas, Texas 75254  
(w/o enclosures)