



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2008

Ms. Chelsea Thornton
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2008-01372

Dear Ms. Thornton:

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# 300858.

The Office of the Governor (the "governor") received a request for information pertaining to Governor Perry's calendar, travel, and renovations at the Governor's Mansion. You state that you will release a portion of the responsive information. You claim that the submitted information is excepted from disclosure under section 552.101 and 552.107 of the Government Code. We have also received comments from the Texas Department of Public Safety (the "department"). *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, the governor asserts that the request for information was withdrawn by operation of law because the governor sent the requestor a cost estimate pertaining to the request for information on November 20, 2007 and as of January 7, 2008 the governor has not received a response from the requestor. *See* Gov't Code §§ 552.2615(a), .263(f). However, we have examined the cost estimate upon which your representation is based and because you did not inform that requestor that he could make a complaint to our office alleging that he has been overcharged, we determine that it does not comply with the provisions of section 552.2615 of the Act. *See id.* § 552.2615. Accordingly, we conclude the requestor's public information request has not been withdrawn by operation of law. We will, therefore, address your arguments against disclosure of the submitted information under the Act.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that information may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of “special circumstances.” See Open Records Decision No. 169 (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.*

The governor asserts that Exhibits C, D, E, and F must be withheld because the privacy rights of the Governor include the right to be safe from physical harm. The governor states that the department is responsible for the Governor’s personal safety, as well as the personal safety of his family. The arguments submitted by the department also explain that portions of this information reveal the number of individuals protecting the Governor and that the department does not publicly identify the number of individuals protecting the Governor on a permanent basis or at any particular time. The governor also asserts that portions of the information reveal security precautions and detailed layouts of the Governor’s Mansion, and that the release of this information would be valuable for someone who intended to cause the Governor harm. Based on these representations and our review, we determine that the release of these exhibits would place the Governor in imminent threat of physical danger. Accordingly, the governor must withhold Exhibits C, D, E, and F in their entirety under section 552.101 of the Government Code in conjunction with the “special circumstances” aspect of common-law privacy.

Next, the governor asserts that Exhibit B is excepted from public disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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. 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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. *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).

In this case, the governor asserts that the communication in Exhibit B was made for the purpose of facilitating the rendition of professional legal services. You assert that the communication was between governor staff and the governor’s counsel. You also indicate that the communication was intended to be, and has remained, confidential among the intended parties. Thus, the governor may withhold Exhibit B under section 552.107(1) of the Government Code.

In summary, the governor must withhold Exhibits C, D, E, and F in their entirety under section 552.101 of the Government Code in conjunction with the “special circumstances” aspect of common-law privacy. The governor may withhold Exhibit B under section 552.107(1).

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

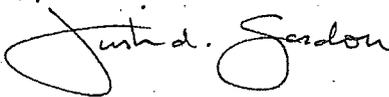
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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.

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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 300858

Enc. Submitted documents

c: Mr. Matt Angle
Lone Star Project
6 E Street SE
Washington, DC 20003
(w/o enclosures)