



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 3, 2008

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

OR2008-09037

Dear Mr. Swope:

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# 316299.

The Harris County Public Health and Environmental Services Department (the "department") received a request for all documents, including but not limited to handwritten notes, e-mails, or any other communications and correspondence, referring to or containing communications about mobile food establishments that were sent or received by three named individuals between January 1, 2007 and April 29, 2008. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 information protected by the informer's privilege, which has long been recognized by Texas courts. *E.g., Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report

violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You state that a portion of the information submitted in Exhibit B reveals the identities of individuals who complained to the department about possible violations of safe food handling and sanitation practices. You inform us that the department is responsible for enforcing section 121.003, and chapters 437 and 438 of the Health and Safety Code, statutes which, you say, “comprise the minimum standards regarding food safety and sanitation in retail food establishments.” *See* Health and Safety Code § 437.002(a) (authorizing county or public health district to enforce state laws and rules concerning food service establishments, retail food stores, mobile food units, and roadside food vendors), .003 (authorizing county to require food service establishments, retail food stores, mobile food units, . . . to obtain permits). You indicate that the department may issue citations for violations of these statutes pursuant to chapter 341 of the Health and Safety Code. *See id.* §§ 341.091 (providing criminal penalties), .092 (providing civil penalties); *see also id.* §§ 437.016; 438.018, .036. Based on your representations and our review of the submitted information, we conclude that the department may withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The department must release the remaining information in Exhibit B to the requestor.

You assert that the information submitted in Exhibit B-1 is excepted from disclosure pursuant to section 552.107(1) of the Government Code, which 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, you assert that the e-mails submitted in Exhibit B-1 consist of communications created for the express purpose of facilitating legal services and giving or seeking advice from the client. You contend that the communications are between department employees and Harris County attorneys, which you have identified. Finally, you represent that the communications were intended to be kept confidential among the intended parties and that the department has not waived that confidentiality. Therefore, after reviewing your arguments and all of the submitted e-mails, we find that you may withhold the e-mails we have marked in Exhibit B-1 under section 552.107(1) of the Government Code. However, we note that the remaining e-mails in Exhibit B-1 consist of communications that do not pertain to the rendition of professional legal services by an attorney. Thus, you have failed to demonstrate how these e-mails constitute privileged communications. Accordingly, section 552.107 is not applicable to the remaining e-mails in Exhibit B-1, and they may not be withheld on this basis.

In summary: (1) the department may withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege, and (2) the department may withhold the e-mails we have marked in Exhibit B-1 under section 552.107(1) of the Government Code. The remaining submitted information must be released to the requestor.

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). If the governmental body does not file suit over 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,



Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 316299

Enc. Submitted documents

c: Ms. Liz Peterson
Houston Chronicle
801 Texas Avenue
Houston, Texas 77002
(w/o enclosures)