



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 20, 2008

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2008-11419

Dear Mr. Smith:

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# 319546.

The Texas Health and Human Services Commission (the "commission") received two requests for certain information pertaining to a specified United States Department of Labor ("DOL") investigation of the Department of State Health Services ("DSHS"). You state that you will release some of the requested information to one of the requestors. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin with the Act's procedural requirements. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301. You state that the commission received the first request for information on June 4, 2008. However, you did not raise sections 552.101 and 552.108 until June 26, 2008. Consequently, you failed to raise these exceptions to disclosure within the ten business day period mandated by section 552.301(a) of the Government Code. Because these exceptions were not timely claimed, they cannot apply unless a compelling reason to withhold the information is shown. Gov't Code § 552.302. (presumption of openness resulting from untimely request overcome by showing of compelling reason to information requested information); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). The need of another governmental body to withhold requested information can provide a compelling reason to withhold requested information. See Open Records Decision No. 586 (1991). In this case, you bring your claims under section 552.101 and 552.108 to protect the interests of the DOL. Thus, we will consider your claims under these exceptions. See *id.*

You state the DOL considers all communications with DOL regarding the investigation to be confidential under exemption seven in the Freedom of Information Act ("FOIA"), title 5 of section 552(b) of the United States Code. See 5 U.S.C. § 552(b)(7). You state that you "understand the DOL to contend that its communications with the [c]ommission and DSHS to come within the protection of sections 552.101 and 552.108 of the Government Code."

We consider first the section 552.101 claim. 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. This section encompasses information protected by other statutes. In Attorney General Opinion MW-95 (1979), this office determined that the FOIA does not apply to records held by a Texas agency or its political subdivision. Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. See Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). However, you raise Open Records Decision No. 561 (1990), which addresses the confidentiality of information shared between a Texas entity and a federal agency, and argue that "[b]ecause the DOL considers the communications submitted as Exhibit B to be confidential under federal law, the [c]ommission is required to withhold those communications at this time under the . . . Act."

This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. The interagency

transfer doctrine is based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we concluded that, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

However, the situation here is not a situation in which a federal agency is sharing information as an interagency transfer. This situation is one in which in the course of conducting an investigation of a Texas agency, a federal agency is communicating with the agency it is investigating. The policy concern for maintaining the free-flow of information between agencies is therefore not present. Consequently, we find the information in exhibit B is not confidential under federal law.

Next, we will address your contention that the information submitted in Exhibit B is confidential under section 552.108. Section 552.108(a)(1) of the Government Code generally excepts from disclosure information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime, if release of the information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

By its terms, section 552.108 applies only to records created by an agency whose primary function is to investigate or prosecute crimes and enforce criminal laws. *See* Open Record Decision Nos. 493 (1988), 287 (1981). The commission is not a law enforcement agency. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending criminal case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. In this instance, the commission has not established that the information relates to a pending criminal case or shown that either

the commission or the DOL is functioning as a law enforcement agency in this matter or that a law enforcement agency wishes to withhold the information at issue. Therefore, the commission may not withhold any of the submitted information under section 552.108 of the Government Code.

Next, you assert that the information submitted in Exhibit C is excepted from disclosure pursuant to section 552.107(1) of the Government Code, which 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 state that the communications submitted in Exhibit C were between commission and DSHS attorneys and commission and DSHS staff that were made for the purpose of “receiving legal guidance or facilitating the provision of legal services.” You state that “although not all of the communications received by the staff attorneys may reflect an explicit request for legal services in the transmission message, all of the communications

were provided to the staff attorneys for the sole purpose of legal review, evaluation, and guidance” and thus implicitly constitute legal advice and opinion. You also state that the confidentiality of the submitted information has been maintained. Upon review, we agree that some of the submitted information in Exhibit C constitutes privileged attorney-client communications, and the commission may withhold the information we have marked on that basis under section 552.107 of the Government Code. However, we find that you have not sufficiently demonstrated that any of the remaining information constitutes communications between privileged parties. Therefore, the commission may not withhold the remaining submitted information in Exhibit C under section 552.107(1) of the Government Code.

We note that Exhibit B contains information excepted from required disclosure under section 552.117. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, and family member information of current or former officials of a governmental body who request that this information be kept confidential under section 552.024.<sup>1</sup> We note, however, an individual’s personal post office box number is not a “home address” for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the commission must withhold this personal information that pertains to a current or former employee of the commission who elected, prior to the commission’s receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked the information in Exhibit B that must be withheld if section 552.117 applies.

In summary, the commission may withhold the information we have marked in Exhibit C under section 552.107(1) of the Government Code. The commission must withhold the information we have marked in Exhibit B under section 552.117 of the Government Code if the individuals at issue timely elected to keep this information confidential under section 552.024 of the Government Code. The remaining submitted information must be released.

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

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

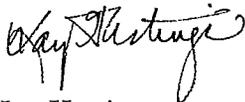
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/jh

Ref: ID# 319546

Enc. Submitted documents

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