



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2009-01742

Dear Ms. Alexander:

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# 334794.

The Texas Department of Transportation (the "department") received three requests from three different requestors for two specified audit reports, information pertaining those reports, and personnel information related to disciplinary actions against department employees. You state that some of the requested information has been or will be released to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.116, 552.117, 552.130 and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹Although you also argue the attorney-client privilege under section 552.101 of the Government Code, this office has concluded that section 552.107 is the appropriate exception. *See* Open Records Decision No. 676 (2002). Thus, we consider your attorney-client arguments only under section 552.107.

²We 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.

You claim that Exhibit B is excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that the submitted information consists of working papers that were compiled by the department's internal auditor during the course of audits authorized under chapter 321 of the Government Code. *See* Transp. Code § 201.108 (Texas Transportation Commission shall appoint internal auditor for department); *see also* Gov't Code §§ 321.0131-.0134, 321.0136, 2102.007 (relating to duties of the internal auditor). Upon review of the submitted documents and consideration of the arguments, we conclude the department may withhold Exhibit B under section 552.116.³

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of the Exhibit B.

Next, you seek to withhold Exhibit C 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).

You state that Exhibit C contains e-mails sent by and among attorneys and employees of the department. You also state that the information in Exhibit C consists of communications that were made in connection with the rendition of professional legal services. Finally, you state that the communications have remained confidential. Based upon your representations, and our review, we conclude that the information in Exhibit C constitutes or documents privileged communications made for the purpose of facilitating the rendition of professional legal services to the department. Therefore, the department may withhold this information under section 552.107 of the Government Code.⁴

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of Exhibit C.

Next, you claim that the information you have marked in the documents labeled "Employee Confidential" is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You do not inform us, and the submitted information does not reflect, whether the department employees at issue elected to keep their information confidential pursuant to section 552.024 of the Government Code prior to the department receiving the request at issue. If the department employees made timely elections under section 552.024 and the cellular telephone service at issue was not paid for by the department, the department must withhold the information you have marked in the "Employee Confidential" documents under section 552.117(a)(1). If the employees at issue did not make timely elections under section 552.024, or if the department paid for the cellular telephone service, the marked information in the "Employee Confidential" documents may not be withheld under section 552.117(a)(1).

In summary, the department may withhold Exhibit B under section 552.116 of the Government Code. The department may withhold Exhibit C under section 552.107 of the Government Code. If the department employees made timely elections under section 552.024, the department must withhold the information you have marked in the "Employee Confidential" documents under section 552.117(a)(1). However, the department may only withhold the employee's marked cellular telephone number if the department did not pay for the cellular telephone service. The remaining information in the "Employee Confidential" documents must be released to the requestors who requested that information.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script, appearing to read "Laura E. Ream".

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/eb

Ref: ID# 334794

Enc. Submitted documents

cc: Requestors
(w/o enclosures)