



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 11, 2009

Mr. Les Trobman
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Kathleen Decker
Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2009-03196

Dear Mr. Trobman and Ms. Decker:

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# 337043.

The Texas Commission on Environmental Quality (the "commission") received a request for any information pertaining to YFZ Land, L.L.C. in Eldorado, Texas. The commission's General Counsel and Litigation Division each submitted a separate set of responsive documents and arguments. Both the General Counsel and the Litigation Division have released some responsive documents to the requestor. The General Counsel claims that the information it has submitted is excepted from disclosure under sections 552.107, and 552.111 of the Government Code. The Litigation Division claims that portions of the information it has submitted are excepted from disclosure under section 552.101. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we will address the documents and arguments submitted by the Litigation Division. Section 552.101 excepts from public disclosure "information considered to be confidential

by law, either constitutional, statutory, or by judicial decision.” This exception encompasses 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. *See* 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 1-2 (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 (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 the submitted information is related to complaints of alleged violations under chapters 111, 116, 285, 309, 312, 330, 332, and 334 of title 30 of the Texas Administrative Code. You explain that the Texas legislature granted the commission authority to regulate these environmental laws under Water Code chapter 26, and Health and Safety Code chapters 361, 366, and 382. You further state that there are administrative and civil penalties for a violation of the code provisions at issue. *See e.g.* Water Code §§ 7.052, 7.102. Based on your representations and our review of the submitted information, we conclude that the commission may withhold the complainant’s identifying information, which you have marked, under section 552.101 of the Government Code in conjunction with the informer’s privilege. The remaining information submitted by the Litigation Division must be released to the requestor.

Next, we will address the documents and arguments submitted by the General Counsel. The General Counsel asserts that this information is excepted from disclosure under 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 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 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 inform us that the General Counsel is the commission’s chief legal officer and adviser, and that the General Counsel and Assistant General Counsels regularly provide the Commissioners legal advice and assistance with regard to all items set on the commission’s public meeting agendas or raised in pending litigation. You also state that the Commissioners are the clients of the General Counsel. You state that the submitted information was prepared by the General Counsel in furtherance of the rendition of professional legal services to the Commissioners, and this information has been maintained as confidential. Based on your representations and our review of the information submitted by the General Counsel, we conclude the General Counsel may withhold this information under section 552.107 of the Government Code.¹

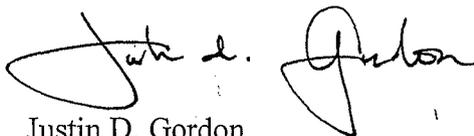
In summary, the Litigation Division may withhold the information that is has marked in the information it submitted under section 552.101 of the Government Code in conjunction with the informer’s privilege. The remaining information submitted by the Litigation Division must be released. The General Counsel may withhold the information it submitted under section 552.107 of the Government Code.

¹As our ruling on this information is dispositive, we do not address the General Counsel’s remaining arguments.

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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 337043

Enc. Submitted documents

c: Requestor
(w/o enclosures)