



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2009

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

OR2009-07508

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# 345090.

The Texas Health and Human Services Commission (the "commission") received a request for specified e-mails from named commission employees during a specified period of time regarding a certain incident.¹ You state you have provided the requestor with some of the responsive information. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, you represent some of the requested information is made confidential by section 552.101 of the Government Code in conjunction with section 531.1021(g) of the Government Code. In Open Records Letter No. 2004-8876 (2004), we issued a previous determination that authorizes the commission to withhold information and materials compiled by the commission's OIG in connection with its investigations under section 531.1021(g) without the necessity of again requesting an attorney general decision with regard to the applicability of this exception. *See Gov't Code* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under section 552.301(a)). Therefore, to the extent the requested information

¹You inform us that the requestor narrowed her original request. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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.

was compiled by the commission's OIG in connection with an investigation under section 531.1021(g) of the Government Code, the commission must withhold that information in accordance with Open Records Letter No. 2004-8876.

You contend that the submitted information is excepted from public disclosure under section 552.107 of the Government Code. Section 552.107 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 Inc. 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). 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. TEX. R. EVID. 503(b)(1)(A)-(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. Finally, the attorney-client privilege applies only to a confidential communication, 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 the submitted e-mails are between commission attorneys and commission staff members and between commission attorneys and other attorneys and staff members of agencies in privity with the commission. You state that the communications were made in furtherance of the rendition of professional legal services to the commission. You further state that the information at issue was intended to be confidential and the commission has maintained its confidentiality. However, you have not identified several of the parties to the communications. *See Open Records Decision No. 542 (1990)* (stating that

governmental body has burden to establishing that exception applies to requested information). From our review of the information at issue, we have been able to identify these unidentified individuals as commission staff. Accordingly, we find that the commission may withhold the responsive submitted information under section 552.107 of the Government Code.

In summary, to the extent the requested information was compiled by the commission's OIG in connection with an investigation under section 531.1021(g) of the Government Code, the commission must withhold that information in accordance with Open Records Letter No. 2004-8876. The department may withhold the responsive submitted information under section 552.107 of the Government Code.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 345090

Enc. Submitted documents

c: Requestor
(w/o enclosures)