



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2009

Mr. Dan Meador
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-08189

Dear Mr. Meador:

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# 345928 (DSHS File: O14898-2009).

The Texas Department of State Health Services (the "department") received two requests from the same requestor for records pertaining to a specified complaint. You state you have released a portion of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Initially, we note that the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-12573 (2008). With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on Open Records Letter No. 2008-12573 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same

governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

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. Section 552.101 encompasses information made confidential by other statutes. Section 531.1021 of the Government Code provides in relevant part as follows:

(g) All information and materials subpoenaed or compiled by the [Office of the Inspector General of the Health and Human Services Commission (the “office”)]¹ in connection with an audit or investigation are confidential and not subject to disclosure under [the Act], and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office [of inspector general] or its employees or agents involved in the audit or investigation conducted by the office, except that this information may be disclosed to the office of the attorney general, the state auditor’s office, and law enforcement agencies.

(h) A person who receives information under Subsection (g) may disclose the information only in accordance with Subsection (g) and in a manner that is consistent with the authorized purpose for which the person first received the information.

Id. § 531.1021(g), (h). You assert the submitted investigation documents were compiled during an investigation conducted by the office. Upon review, we agree the information the department has marked is confidential under section 531.1021(g) and must be withheld under section 552.101 of the Government Code.²

You assert some of the remaining information is excepted from disclosure under 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 the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose

¹We note the Health and Human Services Commission directly oversees the department.

²As our ruling is dispositive of this information, we need not address your remaining arguments against its disclosure.

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 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 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See 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. 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 the information at issue consists of a confidential communication between a department employee and the department’s general counsel. You also indicate the communication was for the purpose of facilitating the rendition of professional legal services to the department. You state the confidentiality of the communication has been maintained. Based on your arguments and our review, we find the department may withhold the information it has marked under section 552.107.

You have marked some of the remaining information under section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code. § 552.147. We agree that the department may withhold the social security number it has marked under section 552.147.

In summary, to the extent any portion of the submitted information was ruled upon in Open Records Letter No. 2008-12573, the department must continue to rely on that ruling as a

previous determination and withhold or release the identical information in accordance with that ruling. If the submitted information was not previously ruled upon, the department must withhold the information it has marked under section 552.101 in conjunction with section 531.1021 of the Government Code. The department may withhold the information it has marked under sections 552.107 and 552.147 of the Government Code. The remaining information must be released.

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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 345928

Enc. Submitted documents

cc: Requestor
(w/o enclosures)