



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 10, 2009

Mr. Robert Wilson
Compact Commissioner
Texas Low Level Radioactive Waste Disposal Compact Commission
711 West 7th Street
Austin, Texas 78701

OR2009-09545

Dear Mr. Wilson:

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# 349353.

The Texas Low Level Radioactive Waste Disposal Compact Commission (the "commission") received a request for all correspondence sent to or from the commissioners during a specified time period.¹ You state the commission has provided some of the responsive information to the requestor. You claim the submitted e-mails are excepted from disclosure under sections 552.106 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You state the commission sought and received clarification from the requestor regarding a portion of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We assume 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 seek to withhold the e-mails and attachments submitted as Exhibit D under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* 460 at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2.

You state the e-mails and attachments in Exhibit D contain discussions and drafts of proposed state legislation concerning appropriations riders to fund the commission’s activities. You also state the documents reflect policy judgments, recommendations, and proposals pertaining to the proposed legislation. Based on these representations and our review, we conclude the draft legislation and portions of the e-mails in Exhibit D constitute advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, the commission may withhold this information, which we have marked, under section 552.106 of the Government Code. You have not demonstrated, however, how the remaining information in Exhibit D, which consists of purely factual information, reveals advice, opinion, analysis, or recommendation regarding proposed legislation. Therefore, the remaining information in Exhibit D may not be withheld pursuant to section 552.106 of the Government Code.

We note the remaining information in Exhibit D includes e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses in the remaining information in Exhibit D are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b). As you have made no further arguments against disclosure of the remaining information in Exhibit D, it must be released.

Section 552.107(1) of the Government Code 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).

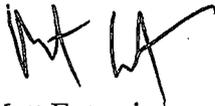
You assert the e-mails submitted in Exhibit E consist of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between identified commissioners, commission staff, and attorneys representing the commission and commissioners. Finally, you state the communications were to be kept confidential among the intended parties and the confidentiality has been maintained. Therefore, the commission may withhold the e-mails in Exhibit E under section 552.107 of the Government Code.

In summary, the commission may withhold the marked information in Exhibit D under section 552.106 of the Government Code. The commission must withhold the marked e-mail addresses in Exhibit D under section 552.137 of the Government Code, unless the owners of the addresses have consented to their release. The commission may withhold the e-mails in Exhibit E under section 552.107 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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 349353

Enc. Submitted documents

c: Requestor
(w/o enclosures)