



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2009

Ms. Susan K. Durso
General Counsel
Texas Residential Construction Commission
P.O. Box 13509
Austin, Texas 78711-3509

OR2009-09587

Dear Ms. Durso:

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# 348737 (TRR PIR #2746).

The Texas Residential Construction Commission (the "commission") received a request for all information related to the requestor's complaint file. You state the commission has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. You raise section 409.003 of the Property Code for the addresses you have marked. Section 409.003 provides in relevant part as follows:

¹Although you also raise section 552.103 of the Government Code, you have provided no arguments in support of withholding the submitted information under this exception. Therefore, we do not address the applicability of section 552.103 to the submitted information. See Gov't Code §§ 552.301(e)(1)(A), .302.

(d) The commission shall make available to the public information about each complaint that resulted in disciplinary action by the commission.

(e) The commission may not disclose the address of any individual home registered with the commission when making information available to the public under this title, except as necessary to implement this title.

(f) Notwithstanding Subsections (d) and (e), the commission may not disclose the address of an individual home registered with the commission:

(1) on the commission's Internet website; or

(2) in connection with an open records request under Chapter 552, Government Code.

Prop. Code § 409.003(d)-(f). You indicate the addresses at issue are the addresses of individual homes registered with the commission. Based on your representation and our review, we determine that the addresses you have marked must be withheld under section 552.101 in conjunction with section 409.003(f)(2) of the Property Code.

Next, you raise 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 explain the e-mails in Exhibit D consist of confidential communications between commission employees, agents, and attorneys, made for the purpose of facilitating the rendition of professional legal services. You further state the communications have remained confidential. Based on your representations and our review, we conclude the e-mails in Exhibit D consist of privileged attorney-client communications. Therefore, the commission may withhold Exhibit D under section 552.107 of the Government Code.²

Finally, you raise 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 you have marked in the remaining information are not of a type specifically excluded by section 552.137(c). Therefore, the commission must withhold the e-mail addresses you have marked in accordance with section 552.137, unless the commission receives consent for their release.

In summary, the commission must withhold the addresses you have marked under section 552.101 of the Government Code in conjunction with section 409.003(f)(2) of the Property Code. The commission may withhold Exhibit D section 552.107 of the Government Code. The commission must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the commission receives consent for their release. The remaining information must be released to the requestor.

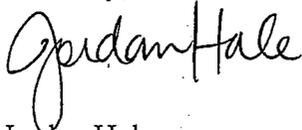
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

²As our ruling is dispositive, we need not address your remaining argument under section 552.111 of the Government Code.

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 that reads "Jordan Hale". The signature is written in black ink and is positioned above the printed name.

Jordan Hale
Assistant Attorney General
Open Records Division

JH/eeg

Ref: ID# 348737

Enc. Submitted documents

cc: Requestor
(w/o enclosures)