



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2009

Mr. Don Redmond  
Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2009-13040

Dear Mr. Redmond:

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# 353864.

The Texas Commission on Environmental Quality (the "commission") received a request for copies of all filings and correspondence sent during a specified period of time between the commission and the Office of the Attorney General regarding Waste Control Specialists, LLC ("WCS") or its disposal facility in Andrews County. You state some of the responsive information has been released. You claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You also indicate release of portions of the submitted information may implicate the proprietary interests of WCS. We understand you have notified WCS of this request for information and its right to submit arguments to this office as to why the company's information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note portions of the information may be subject to disclosure under section 552.008 of the Government Code. This section grants access to requested

information, including confidential information, to individual members, agencies, or committees of the Texas Legislature. Section 552.008 provides as follows:

(a) Th[e Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with th[e Act] if the requesting member, agency or committee states that the public information is requested under th[e Act] for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(c) This section does not affect:

- (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;

(2) the procedures under which the information is obtained under other law; or

(3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008. As you note, the requestor is Texas State Representative Lon Burnam. Representative Burnam does not state, however, and it is not otherwise clear to this office that his request was made for legislative purposes. Accordingly, we must rule on the applicability of section 552.008 in the alternative. If Representative Burnam made this request for legislative purposes, then the commission must make the submitted information available to him in accordance with section 552.008 of the Government Code. *See id.* § 552.008(b). We note section 552.008 permits a governmental body to require a member of the legislature to sign a confidentiality agreement for the protection of information obtained pursuant to this section. *Id.* In addition, release of this information to Representative Burnam under section 552.008 does not waive or affect the confidentiality of the information for the purposes of state or federal law or waive the commission's right to assert exceptions to required public disclosure of this information to future requestors. *See id.* But if this request for information was not made for legislative purposes, then the requested information need not be released to Representative Burnam under section 552.008, and we will consider your arguments against its public disclosure.

Next, you state the information in Exhibit E was the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-02521 (2008) and 2009-10640 (2009). You indicate the facts and circumstances have not changed since the issuance of these prior rulings. Accordingly, the commission must withhold or release the information in Exhibit E in accordance with Open Records Letter Nos. 2008-02521 and 2009-10640. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information not previously requested and ruled upon by this office, we will address your arguments.

You claim most of the remaining information is excepted from disclosure under 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 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). 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. 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 portions of the submitted information reflect or consist of confidential communications between commission staff and attorneys that were made for the purpose of rendering professional legal advice. You also state the confidentiality of the communications has been maintained. Based on these representations and our review of the information at issue, we find the commission may withhold the information it has marked under section 552.107 of the Government Code.<sup>1</sup>

You claim the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

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<sup>1</sup>As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state the remaining information relates to several lawsuits contesting actions the commission has taken regarding WCS's license applications. You inform us, and provide documentation showing, the lawsuits have been filed in District Court in Travis County and the litigation is pending. Based on your representations and our review, we find you have demonstrated litigation was pending when the commission received this request for information. Further, we find the remaining information consists of documents relating to the pending litigation. Thus, we conclude the commission may withhold the remaining information under section 552.103 of the Government Code.<sup>2</sup>

We note, however, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, any information at issue that has either been obtained from or provided to all opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

In summary, if Representative Burnam's request was made for legislative purposes, the information he requested must be released to him under section 552.008 of the Government Code. If the request is not for legislative purposes, the commission must release or withhold the information in Exhibit E in accordance with Open Records Letter Nos. 2008-02521 and 2009-10640. The commission may withhold the information it has marked under section 552.107 of the Government Code. The commission may withhold the remaining information under section 552.103 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](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, toll free, at (888) 672-6787.

Sincerely,



Karen E. Stack  
Assistant Attorney General  
Open Records Division

KES/jb

Ref: ID# 353864

Enc. Submitted documents

c: Requestor  
(w/o enclosures)