



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 8, 2009

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2009-14172

Dear Ms. Soucy:

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# 357735 (Comptroller ID# 5843874327).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for all documents pertaining to discussions with Greyhound Lines Inc. concerning invoices to the state for services during hurricanes Ike and Gustav. You state that the comptroller is releasing some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

¹We 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.

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 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.² 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 that the information at issue consists of confidential communications between parties who share a privity of interest concerning legal matters affecting the state.³ Further, you state that these communications were made for the purpose of facilitating the rendition of professional legal services pertaining to issues in which the comptroller, the Governor’s Division of Emergency Management, and the Office of the Attorney General share a common interest. You further explain that these documents were intended to be confidential and have not been disclosed to persons other than those to whom disclosure was made in

²Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A)-(E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

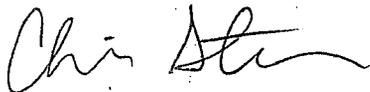
³*See* Tex. R. Evid. 503(a)(2) (defining “representative of the client” as person having authority to obtain legal services or to act on legal advice on behalf of client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

furtherance of the rendition of legal services. You have identified most of the parties to the communications. Based on your representations and our review of the submitted documents, we find that the information at issue consists of privileged attorney-client communications that the comptroller may withhold under section 552.107(1) of the Government Code. See TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and *concerning a matter of common interest therein*) (emphasis added); TEX. R. DISCIPLINARY CONDUCT 1.05(c)(1) (lawyer may reveal confidential information when lawyer has been expressly authorized to do so in order to carry out representation); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (if two or more clients with common interest in litigated or nonlitigated matter and represented by separate lawyers agree to exchange information concerning the matter, communication of any such information that otherwise qualifies as privileged under §§ 68-72 and that relates to the matter is privileged as against third persons, and any such client may invoke privilege unless it has been waived by client that made communication). As our ruling is dispositive, we need not address your remaining argument against disclosure.

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, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 357735

Enc. Submitted documents

c: Requestor
(w/o enclosures)