



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2009

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2009-16953

Dear Mr. Ramirez:

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# 362834.

The Lower Colorado River Authority (the "LCRA") received two requests for information pertaining to the Crosswater Marina project. The first requestor requested any correspondence from 2006 to 2007 on Crosswater or Harbor Ventures and information pertaining to a specified mediation. The second requestor requested copies of the fees, communications, and information pertaining to three specified marina permits, as well as all letters written to the LCRA by eleven named individuals. You state that you have released some information to the second requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which contains a representative sample.² We have also received and considered comments from the first requestor. *See* Gov't Code § 552.304.

We note the first requestor later modified her request to exclude any personal telephone numbers, social security numbers, or home telephone numbers of any employee of the LCRA, Crosswater, Harbor Ventures or anyone else involved in the mediation at issue; thus,

¹Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (2002).

²We assume that the "representative sample" of records submitted to this office in Exhibit 2 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.

any of this information within the submitted documents is not responsive to the first request, and the LCRA need not release it in response to the first request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes, such as section 154.073 of the Civil Practice and Remedies Code, which states in pertinent part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Further, in Open Records Decision No. 658 (1998), this office found that communications made during the formal settlement process are intended to be confidential. Open Records Decision No. 658 at 4 (1998); *see also* Gov't Code § 2009.054(c). You claim the submitted mediation records in Exhibit 2 are confidential under section 154.073. You inform us that these records are notes that were taken by an LCRA employee during the mediation and are related to the Crosswater Marina matter at issue in the mediation. You state that these records pertain to a dispute resolution procedure in which the LCRA was a participating party and a third-party, independent mediator was involved. Based on your representations and our review of the information in Exhibit 2, we agree these mediation records were made during the course of an alternative dispute resolution proceeding. Thus, Exhibit 2 is confidential under section 154.073 of the Civil Practice and Remedies Code and must be withheld under section 552.101 of the Government Code.

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.*, 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 pet.). 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 indicate Exhibits 3 and 4 consist only of communications between or among LCRA employees, employee representatives, lawyers, and lawyer representatives for the purpose of rendering professional legal services to the LCRA, all of which you have identified. You also state that the communications were to be kept confidential among the intended parties and that the confidentiality of the communications has been maintained. Additionally, we note that the communications in Exhibits 3 and 4 are exclusively between LCRA staff members and do not involve any individuals outside the LCRA. Based on your representations and our review, we find the LCRA has established the applicability of section 552.107(1) to Exhibits 3 and 4. Therefore, the LCRA may withhold Exhibits 3 and 4 under section 552.107 of the Government Code.

You raise section 552.117 of the Government Code for portions of the remaining information in Exhibit 5. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. You inform us that the employees at issue timely elected

confidentiality under section 552.024. Therefore, the LCRA must withhold the information we have marked in Exhibit 5 under section 552.117(a)(1) of the Government Code.³

We note that Exhibit 5 contains information that is protected under common-law privacy. 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 the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find a portion of Exhibit 5 is intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked in Exhibit 5 under section 552.101 of the Government Code in conjunction with common-law privacy.

We further note that Exhibit 5 contains personal e-mail addresses. Section 552.137 of the Government Code 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).⁴ See *id.* § 552.137(a)-(c). Exhibit 5 contains e-mail addresses that are not a type specifically excluded by section 552.137(c). Accordingly, the LCRA must withhold the information we have marked in Exhibit 5 under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the LCRA must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. The LCRA may withhold Exhibit 3 and Exhibit 4 under section 552.107 of the Government Code. The LCRA must withhold the information in Exhibit 5 it has marked under section 552.117(a)(1) of the Government Code. The LCRA must withhold the information

³We note that section 552.024(c)(2) of the Government Code now allows a governmental body to redact certain personal information pertaining to employees who properly elected to keep their information confidential without the necessity of requesting a ruling from this office. See Gov't Code § 552.024(c)(2).

⁴The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The LCRA must withhold the information we have marked under section 552.137 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, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/jb

Ref: ID# 362834

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)