



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2010

Ms. Kathleen Decker
Director - Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2010-01660

Dear Ms. Decker:

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# 369176 (TCEQ PIR # 09.11.06.05).

The Texas Commission on Environmental Quality (the "commission") received a request for all documents, letters, reports, emails, memos, statements, complaints, investigations, and personnel records from January 1, 2005 through December 31, 2006 concerning site visits to all Dow Chemical Company facilities and meetings involving named individuals. You state that you have released a portion of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

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.

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. *See* 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. *See 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 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. *See* 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. *See 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).

The commission asserts the e-mails, letters, and attachments in Exhibit B are privileged communications providing legal advice between commission staff attorneys and commission staff members. You identify the parties involved in the communications. You also indicate that the communications were intended to remain confidential and state that you are not aware of this confidentiality being waived. Based on your representations and our review of the information at issue, we conclude that the commission may withhold Exhibit B under section 552.107(1) of the Government Code.²

The commission asserts the information in Exhibit C is excepted from disclosure under 552.116 of the Government Code. However, we note that a portion of the information in Exhibit C consists of completed evaluations, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure

²As our ruling is dispositive to the information in Exhibit B, we need not address your argument against disclosure of a duplicate portion of this information in Exhibit C under section 552.116.

of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Although you raise section 552.116 of the Government Code for the completed evaluations in Exhibit C, section 552.116 is a discretionary exception to disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.116 is not other law that makes information confidential for purposes of section 552.022. Consequently, the commission may not withhold the completed evaluations in Exhibit C under section 552.116 of the Government Code. However, Exhibit C also contains information that is not subject to section 552.022 of the Government Code. Thus, we will address your argument under section 552.116 of the Government Code for the remaining information in Exhibit C.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that the investigation in Exhibit C is an audit prepared by the commission's Chief Auditor's Office. You inform us that the audit was prepared pursuant to chapter 2102 of the Government Code. *See* Gov't Code § 2102.003 (relating to the duties of an internal auditor). You further explain that the audit was authorized under chapter 321 of the Government Code. *See id.* § 321.0136 ("An investigation is an inquiry into specified acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance."). Based on your representations and our review of the information at issue, we agree that section 552.116 is applicable in this instance. We therefore conclude the commission may withhold the information we have marked in Exhibit C pursuant to section 552.116 of the Government Code.

In summary, the commission may withhold the information in Exhibit B under section 552.107 of the Government Code. The commission may withhold the information we have marked in Exhibit C pursuant to section 552.116 of the Government Code. The remaining information must be released.³

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,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

³We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Ref: ID# 369176

Enc. Submitted documents

c: Requestor
(w/o enclosures)