



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2011

Mr. John E. Richards
Counsel for the North Central Texas Council of Governments
Richards & Valdez
6060 North Central Expressway, Suite 560
Dallas, Texas 75206

OR2011-12256

Dear Mr. Richards:

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# 428099.

The North Central Texas Council of Governments (the "NCTCG"), which you represent, received a request for several categories of information pertaining to the requestor's employment with, and termination from, the NCTCG. You state most of the requested information will be released once the requestor responds to your statement of estimated charges. You claim the submitted memorandum is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

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

¹Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. See Open Records Decision No. 676 at 6 (2002).

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 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 state the submitted memorandum is a confidential communication between an attorney for, and an employee of, the NCTCG that was made in furtherance of the rendition of professional legal services. You also state this communication was intended to be confidential and its confidentiality has been maintained. Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the submitted memorandum. We note, however, the submitted memorandum includes attached e-mails that were sent or received by a non-privileged party. Therefore, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged memorandum, we conclude these e-mails may not be withheld under section 552.107(1). If the marked e-mails do not exist separate and apart from the privileged memorandum, they may be withheld under section 552.107(1). Regardless, the NCTCG may withhold the remaining portions of the memorandum under section 552.107(1) of the Government Code.

We note that one of the marked non-privileged e-mails contains an NCTCG employee’s cellular telephone number. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.² Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)(1)). We note

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The NCTCG may only withhold information under section 552.117(a)(1) if the employee at issue elected confidentiality under section 552.024 prior to the date on which the request for information was made. Thus, if the employee whose cellular telephone number is at issue timely elected confidentiality and paid for the cellular service with her personal funds, the NCTCG must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code. Otherwise, the NCTCG may not withhold this information under section 552.117(a)(1).

In summary, the NCTCG may generally withhold the submitted memorandum and attached e-mails under section 552.107(1) of the Government Code, but may not withhold the non-privileged e-mails we have marked if they exist separate and apart from the otherwise privileged memorandum to which the e-mails are attached. If the non-privileged e-mails do exist separate and apart, the NCTCG must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the employee to whom it belongs timely elected confidentiality under section 552.024 of the Government Code, and paid for the cellular service with her personal funds. In that instance, the NCTCG must release the remaining portions of the non-privileged e-mails.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 428099

Enc. Submitted documents

c: Requestor
(w/o enclosures)