



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

Ms. Laura Moriaty
General Counsel
Texas Board of Veterinary Medical Examiners
333 Guadalupe Street, Suite 3-810
Austin, Texas 78701

OR2012-09419

Dear Ms. Moriaty:

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# 456921.

The Texas Board of Veterinary Medical Examiners (the "board") received a request for all the records pertaining to a named individual.¹ You state some of the requested information does not exist at this time.² You also state the board has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.³ We have

¹You inform us that the board sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed). You also inform us that the board was staffed by a skeleton crew on April 6, 2012.

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

³Although you assert the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5, we note none of the information for which you claim these privileges is subject to section 552.022 of the Government Code. Thus, sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise, respectively, for your attorney-client and work-product privilege claims in this instance. *See generally* Open Records Decision No. 676 (2002).

considered the exceptions you claim and reviewed the submitted representative samples of information.⁴

Initially, we note portions of Exhibit B may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-16424 (2010). In that decision, we ruled the board must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 801.207 of the Occupations Code. Accordingly, as we are unaware of any change in the relevant law, facts, and circumstances on which the previous ruling was based, then to the extent the information in Exhibit B is identical to the information at issue in that ruling, we conclude the board must rely on Open Records Letter No. 2010-16424 as a previous determination and withhold such information in accordance with that ruling.⁵ *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent Exhibit B is not encompassed by the prior ruling, we will consider your argument against disclosure.

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. This exception encompasses information that other statutes make confidential. You contend Exhibit B is confidential under section 801.207 of the Occupations Code. Section 801.207(b) provides that “[a]n investigation record of the board, including a record relating to a complaint that is found to be groundless, is confidential.” Occ. Code § 801.207(b). You indicate Exhibit B relates to a complaint filed with the board and its subsequent investigation of the complaint. Therefore, based on your representations and our review, we conclude this information is confidential under section 801.207(b) of the Occupations Code and must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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. *See* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made “for the purpose of facilitating the

⁴We assume 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 those records contain substantially different types of information than that submitted to this office.

⁵As our ruling for this information is dispositive, we need not address your argument against its disclosure.

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. *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). 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 inform us that Exhibit C consists of communications between the board’s general counsel and board staff and an attorney at the Office of the Attorney General that were made in furtherance of the rendition of professional legal services to the board. You indicate that these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we conclude Exhibit C consists of privileged attorney-client communications the board may withhold under section 552.107(1) of the Government Code.⁶

In summary, the board must rely on Open Records Letter No. 2010-16424 as a previous determination and withhold any identical information in Exhibit B in accordance with that ruling. The board must withhold the remaining information in Exhibit B under section 552.101 of the Government Code in conjunction with section 801.207(b) of the Occupations Code. The board may withhold Exhibit C under section 552.107(1) 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.

⁶As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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/dls

Ref: ID# 456921

Enc. Submitted documents

c: Requestor
(w/o enclosures)