



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 31, 2013

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2013-13241

Dear Mr. Smith:

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# 494796.

The Texas Health and Human Services Commission (the "commission") received a request for (1) documents related to statements made by the commission's Office of Inspector General ("OIG") on March 19, 2013 before the Texas House Human Services Committee regarding the number of legal cases prosecuted or tried by the requestor prior to his employment by the OIG; (2) documents related to the number of legal cases prosecuted or tried by requestor prior to his employment by the OIG; (3) documents related to the number of legal cases prosecuted or tried to a verdict or proposal for decision by the requestor prior to his employment by the OIG; (4) documents, including but not exclusive of e-mails, related to communications regarding the number of legal cases prosecuted or tried to a verdict or proposal for decision by the requestor prior to his employment by the OIG; (5) documents prepared or presented by OIG chief counsel or any other employee of the commission or OIG regarding the number of legal cases prosecuted or tried to a verdict or proposal for decision by the requestor prior to his employment by the OIG; (6) documents related to the professional legal career of the requestor; and (7) documents related to the employment or termination of the requestor. You state you are releasing most of the

requested information to the extent it exists.<sup>1</sup> You claim the remaining information is excepted from disclosure under section 552.107 of the Government Code. 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 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).

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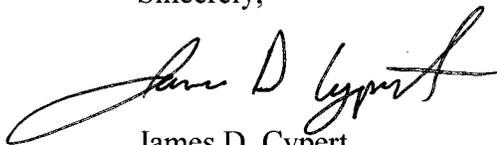
<sup>1</sup>We note that Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

You state the information in Exhibit B consists of communications between commission attorneys and commission employees in their capacities as clients. You state the communications at issue were made for the purpose of rendering legal advice to the commission. You also state these communications were not intended to be and have not been disclosed to third persons. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked under section 552.107(1) of the Government Code. Accordingly, the commission may withhold the information we have marked in Exhibit B under section 552.107(1) of the Government Code. However, in the remaining information at issue, the attorney involved in those communications is acting as a manager and not providing legal advice. Therefore, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information in Exhibit B, and the commission may not withhold any of the remaining information under section 552.107(1). As you raise no further exceptions to disclosure, the remaining information must be released to the requestor.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James D. Cypert  
Assistant Attorney General  
Open Records Division

JDC/tch

Ref: ID# 494796

Enc. Submitted documents

c: Requestor  
(w/o enclosures)