



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 14, 2014

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

OR2014-20776

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# 543092 (TCEQ PIR No. 14-18218).

The Texas Commission on Environmental Quality (the "commission") received a request for any documents authorizing the land application of a specified waste by statute or rule, several categories of information pertaining to a specified Compliance Agreement between Beneficial Land Management, L.L.C. and the commission, the commission's organizational chart that was in effect during a specified time period, and information regarding any enforcement actions the commission has taken against Liquid Environmental Solutions. You state you have and will release some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, you state, and we agree, the information you have marked is not responsive to the present request. This ruling does not address the public availability of non-responsive information, and the commission need not release non-responsive information to the requestor.

Next, we address the requestor's contention the commission failed to comply with its fifteen-business-day deadline under section 552.301(e) in requesting this decision. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written

request for information it wishes to withhold. *See id.* § 552.301(a). Section 552.301(e) provides the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information it seeks to withhold, (2) a copy of the written request for information, (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date, and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). The commission received the request on August 26, 2014. You inform us the commission operated with only a skeleton crew on August 27, 2014, and was closed on September 1, 2014. This office does not count holidays, including skeleton crew days observed by a governmental body, as business days for the purposes of calculating a governmental body's deadline under the Act. Thus, the commission's fifteen-business-day deadline was September 18, 2014. The commission's fifteen-day correspondence, which contained the responsive information, was hand delivered on September 18, 2014. Accordingly, we find the commission complied with section 552.301 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *Id.* § 552.107. 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 Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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, 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)*. 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. *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 claim the responsive information is excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between an attorney for the commission and commission employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the commission. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may withhold the responsive information under section 552.107(1) of the Government Code.<sup>1</sup>

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,



Alley Latham  
Assistant Attorney General  
Open Records Division

AKL/dls

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 543092

Enc. Submitted documents

c: Requestor  
(w/o enclosures)