



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 1, 2003

Mr. John Moore  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street, Room 608  
Austin, Texas 78778-0001

OR2003-2217

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178615.

The Texas Workforce Commission (the "commission") received a request for information relating to unemployment compensation appeals cases decided by the commission from April 1, 2002 through January 13, 2003, in which the commissioner representing employers wrote a long-form dissenting opinion, to include (1) copies of commission decisions, long-form dissenting opinions, and any concurring opinions written by other commissioners and (2) summaries for all such cases prepared by the legal staff of the office of commission appeals. You inform us that the commission released some of the information that is encompassed by part 1 of the present request in connection with a previous request for information. You also inform us that, pursuant to an agreement with the requestor, the commission has released the remaining information that is encompassed by part 1 of the present request, after redacting information that would identify parties to unemployment insurance claims.<sup>1</sup> You also state that some of the information that is encompassed by part 2 of the present request is the subject of a previous open records letter ruling. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered your arguments and have reviewed the information you submitted.

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<sup>1</sup>You inform us that the requestor has agreed with the commission that information that would identify parties to unemployment insurance claims is not responsive to the present request for information.

You inform us that Open Records Letter No. 2003-0196 (2003) addresses some of the information that is encompassed by part 2 of the present request. In the previous ruling, we concluded that responsive case analyses and notes are excepted from disclosure under section 552.107(1) of the Government Code. You do not indicate, and it does not otherwise appear to this office, that there has been any change in the law, facts, or circumstances on which the previous ruling is based. Therefore, we conclude that the commission may continue to rely on Open Records Letter No. 2003-0196 (2003) with respect to the information that is the subject of our ruling under section 552.107(1) in that decision. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) when (1) precisely same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D); (2) same governmental body previously requested and received ruling; (3) prior ruling concluded that same records or information are or are not excepted from disclosure; and (4) law, facts, and circumstances on which prior ruling was based have not changed).

You claim that the remaining information that is encompassed by part 2 of this request is excepted from disclosure under section 552.107(1). Section 552.107(1) 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* 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. *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 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 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), (B), (C), (D), (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).

You state that the remaining requested information consists of a communication made by attorneys for the commission, in furtherance of the rendition of professional legal services to the commission, for the purpose of providing the attorneys' advice and opinion. You also state that this communication was made in confidence, is intended for the sole use of the commissioners, and has not been shared with or distributed to others. Based on your representations, we conclude that you may withhold the rest of the information that is encompassed by part 2 of this request under section 552.107(1).

In summary, the commission may continue to rely on Open Records Letter No. 2003-0196 (2003) with respect to the information that is the subject of our ruling under section 552.107(1) in that decision. The commission may withhold the rest of the information that is encompassed by part 2 of this request for information under section 552.107(1). As we are able to make these determinations, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

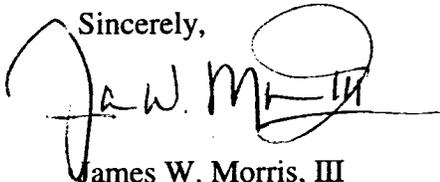
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large, looped initial "J" and a distinct "III" at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 178615

Enc: Submitted documents

c: Mr. Bill Hammond  
Texas Association of Business  
1209 Nueces  
Austin, Texas 78701  
(w/o enclosures)