



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 10, 2003

Mr. J. Kevin Patteson  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2003-6361

Dear Mr. Patteson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186555.

The Office of the Governor received a request for all clemency memoranda prepared by former General Counsel Alberto Gonzales and/or other members of the general counsel staff for former Governor George W. Bush. In addition, you received two requests for the clemency memoranda prepared by General Counsel Bill Jones and/or other members of the general counsel staff for Governor Rick Perry. You state that you will release most of the information contained in the clemency memoranda prepared by former General Counsel Alberto Gonzales. You seek, however, to withhold certain portions of those documents under section 552.101 of the Government Code in conjunction with doctrine of common-law privacy. You also claim that all clemency memoranda prepared for Governor Perry are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted sample records.<sup>1</sup> We have also considered comments submitted by the requestors. *See Gov't Code § 552.304* (allowing interested party to submit comments indicating why requested information should or should not be released).

Initially, we address your arguments for those memoranda prepared for Governor Perry. 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

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<sup>1</sup>We assume that the "sample" records submitted to this office are 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 that those records contain substantially different types of information than that submitted to this office.

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 inform us that the memoranda at issue are confidential communications prepared by an attorney within the Office of the Governor to be used by staff when making recommendations about granting clemency to death-row inmates. You state that these communications were made for the purpose of facilitating the rendition of professional legal services; that they were intended to be confidential; and that their confidentiality has been maintained. After reviewing your arguments and the submitted records, we agree that the memoranda at issue are privileged attorney-client communications.

We note that one of the requestors urges this office to rule on these memoranda in a manner consistent with our holding in Open Records Letter No. 2000-2402 (2000). Specifically, in that letter ruling, this office stated that certain attorney-client communications could not be withheld under section 552.107 because they consisted primarily of factual information. The holding in Open Records Letter No. 2000-2402 was based on the standard articulated in

Open Records Decision No. 574 (1990) which stated, among other things, that factual communications from attorney to client, or between attorneys representing the client, are not protected under section 552.107. In Open Records Decision No. 676 (2002), this office reexamined Open Records Decision No. 574 in light of several factors, including changes in relevant privilege-related rules promulgated by the Texas Supreme Court, and concluded, among other things, that if the privilege is demonstrated, the entire communication, including factual material, is protected under section 552.107. Thus, in accordance with our holding last year in Open Records Decision No. 676, we conclude that the memoranda prepared for Governor Perry may be withheld in their entirety under section 552.107(1) of the Government Code.<sup>2</sup>

You also claim that portions of the memoranda prepared by former General Counsel Alberto Gonzales are protected from disclosure under section 552.101 in conjunction with the doctrine of common-law privacy. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You note that the Gonzales memoranda were the subject of a previous ruling issued by this office. In Open Records Letter No. 2002-2313 (2002), this office concluded that the Texas Library and Archives Commission must withhold certain information contained in these memoranda in order to protect the privacy rights of the identified individuals. You assert that, in accordance Open Records Letter No. 2002-2313, the Office of the Governor must also withhold this information from public disclosure. Based on your assertions and our review of the relevant information, we agree that the Office of the Governor must withhold those portions of the Gonzales memoranda that this office deemed private in Open Records Letter No. 2002-2313.

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

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<sup>2</sup>Because we are able to make a determination under section 552.107(1), we need not address your additional arguments against disclosure.

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).

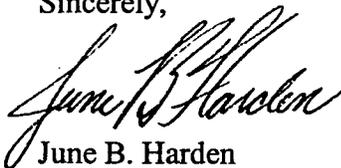
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 186555

Enc: Submitted documents

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