



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2003

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

OR2003-8656

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# 192198.

The Office of the Governor received a request for "notes, memos, information, letters, etc." regarding the November 21, 2002, scheduled execution of James Lee Clark. Some responsive information has been released to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your argument under section 552.107 for the draft memorandum submitted as Exhibit A. Section 552.107(1) excepts from disclosure information that is protected by 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. Finally, 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 the definition of a confidential communication 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 memorandum in Exhibit A consists of a confidential communication from an attorney within the Office of the Governor to staff for use in making recommendations about granting clemency. You therefore indicate that the information was communicated for the purpose of facilitating the rendition of professional legal services to the Office of the Governor. You further state that the information was intended to be confidential, and that the confidentiality of the information has been maintained. Based on these representations and our review of the information, we agree that the memorandum submitted as Exhibit A is protected by the attorney-client privilege and may therefore be withheld from disclosure pursuant to section 552.107 of the Government Code.

We next address your claim under section 552.101 of the Government Code for the information submitted as Exhibit C. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that is made confidential under other statutes. You raise section 552.101 in conjunction with section 508.313 of the Government Code. Chapter 508 of the Government Code relates to parole and mandatory supervision and applies to the Texas Department of Criminal Justice (the “department”). Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) The department, on request or in the normal course of business, shall provide information that is confidential and privileged under Subsection (a) to:

(1) the governor[.]

Gov't Code § 508.313. You indicate that the information in Exhibit C was prepared by the department for use by the Board of Pardons and Paroles, which forwarded the information to the Office of the Governor for the Governor's consideration in a clemency matter. You state that at the time the document in Exhibit C was transferred to the Office of the Governor, James Lee Clark was an inmate subject to executive clemency. Section 508.313 of the Government Code requires the department to transfer information to the Office of the Governor for consideration in clemency matters; such a transfer does not affect the confidentiality of the information. *See* Gov't Code § 508.313(c)-(d). Upon review, we determine that the information in Exhibit C consists of an executive clemency case report about an inmate subject to executive clemency, that was transferred to the Office of the Governor by the department pursuant to section 508.313(c)(1). Accordingly, we determine that the case report in Exhibit C is confidential pursuant to section 508.313 of the Government Code and must be withheld pursuant to section 552.101 of the Government Code.

In summary, the information in Exhibit A is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. The information in Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. Based on these findings, we do not reach 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 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 190800

Enc: Submitted documents

c: Mr. Ward Larkin
15327 Pebble Bend Drive
Houston, Texas 77068-1839
(w/o enclosures)