



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2005

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2005-08854

Dear Mr. Ramirez:

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# 233293.

The Lower Colorado River Authority (the "authority") received a request for 1) information pertaining to requests for water from the 290 pipeline and extensions of the 290 pipeline over a specified period; 2) information pertaining to any decision whether or not to incorporate the Texas Commission on Environmental Quality's ("TCEQ") "Optional Measures" into the water quality requirements in contracts for water from [authority] water lines; 3) information pertaining to communications between the authority and TCEQ or the U.S. Fish and Wildlife Service regarding the Optional Measures; and 4) information pertaining to communications with entities holding contracts for authority water entered into pursuant to the terms of the 290 Pipeline Phase 1 Biological Opinion and Memorandum of Understanding with the U.S. Fish and Wildlife Service pertaining to the Optional Measures and the water quality requirements of those contracts subsequent to TCEQ's promulgation of the Optional Measures. You state that you will release some of the requested information but claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Section 552.107(1) 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 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 a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. 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. *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 information you have submitted consists of communications between authority representatives and its attorneys made for the purpose of the rendition of professional legal services, with the intent that confidentiality would be maintained. Having considered your representations and reviewed the information at issue, we agree that the information you seek to withhold under section 552.107 constitutes privileged attorney-client communications. Therefore, this information may be withheld pursuant to section 552.107(1) of the Government Code.

We note that the requestor urges this office to rule on the spreadsheet submitted as Exhibit J in a manner consistent with 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. However, 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. We concluded, among other things, that if the privilege is demonstrated, the entire communication, including factual material, is protected under section 552.107. Based on our review of your arguments and the information at issue, we conclude that you have demonstrated that Exhibit J consists of a privileged communication between authority representatives and an authority attorney. Thus, in accordance with our holding in Open Records Decision No. 676, we conclude that Exhibit J may be withheld in its entirety under section 552.107(1) of the Government Code.¹

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

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

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 Office of the Attorney General 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. 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 cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 233293

Enc. Submitted documents

c: Mr. John Fritshie
Save Our Springs Alliance
P.O. Box 684881
Austin, Texas 78768
(w/o enclosures)