



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2007

Ms. Sarah Irwin Swanson  
Deputy Director of General Law  
Public Utility Commission of Texas  
P.O. Box 13326  
Austin, Texas 78711

OR2007-07102

Dear Ms. Swanson:

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# 281680.

The Public Utility Commission of Texas (the "commission") received a request for information relating to TPUC Docket 20400, Order Nos. 45 and 48. You inform us that the commission has no information that is responsive to parts of the request.<sup>1</sup> You also inform us that some of the requested information has been released. You state that other responsive information is the subject of a prior open records letter ruling. You have submitted information that the commission seeks to withhold under section 552.107 of the Government Code. We have considered your arguments and have reviewed the submitted information. We also have considered the comments that we received from the requestor.<sup>2</sup>

You inform us that some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2006-02391 (2006). You also state that there has been no change in the law, facts, and circumstances on which the previous ruling was based. Based on your representations, we conclude that the

---

<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

commission may continue to rely on Open Records Letter No. 2006-02391 with regard to the requested information that is the subject of that ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

You also inform us that a portion of one of the submitted documents, which you have marked, is not responsive to this request for information. Likewise, we have marked information that did not exist when the commission received this request and thus is not responsive to the request. This decision does not address the public availability of the submitted information that is not responsive to the request, and the commission need not release any of that information.

You claim that the rest of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code. 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 Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney is 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 contend that the remaining information documents communications between attorneys for the commission and their clients that were made in furtherance of the rendition of professional legal services to the commission. You have identified most of the parties to the communications. You also state that the communications were intended to be and remain confidential. Based on your representations and our review of the information in question, we conclude that the commission may withhold most of the remaining information under section 552.107. We note that the one remaining communication, which we have marked, does not involve attorneys for or representatives of the commission. Because you have not demonstrated that the marked communication falls within the scope of the attorney-client privilege, the commission may not withhold that information under section 552.107(1).

We note, however, that the information in question contains e-mail addresses. Section 552.137 of the Government Code states in part that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter,” unless the owner of the e-mail address has affirmatively consented to its public disclosure.<sup>3</sup> Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the commission must withhold under section 552.137 unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the commission may continue to rely on Open Records Letter No. 2006-02391 with regard to the requested information that is the subject of that ruling; (2) except for the marked communication that does not fall within the scope of the attorney-client privilege, the commission may withhold the remaining responsive information under section 552.107(1) of the Government Code; and (3) the commission must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owner of an e-mail address has consented to its disclosure. The rest of the responsive information must be released.

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

---

<sup>3</sup>Unlike other exceptions to disclosure, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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).

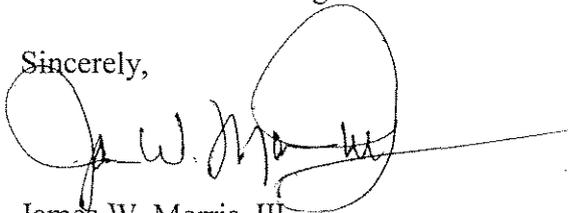
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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).

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 black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

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

JWM/ma

Ref: ID# 281680

Enc: Submitted documents

c: Mr. Leo A. Wrobel  
TelLAWCom Labs Inc.  
100 Ovilla Oaks Drive Suite 200  
Ovilla, Texas 75154  
(w/o enclosures)