



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2007

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2007-11958

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 288813.

The Office of the Attorney General (the "OAG") received a request for information pertaining to an investigation of Tempur-Pedic International, Inc. ("TPI"). The OAG states it will release some of the information but asserts the remainder is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ We have considered the OAG's arguments and have reviewed the submitted sample of information.² We have also received and considered the requestor's and TPI's comments. *See Gov't Code*

¹The OAG asserts the information is protected under section 552.101 of the Government Code in conjunction with the attorney-client privilege pursuant to Texas Rule of Evidence 503 and the work product privilege pursuant to Texas Rule of Civil Procedure 192.5. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass the discovery privileges found in these rules because they are not constitutional law, statutory law, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002).

²We assume that the "representative sample" of records submitted to this office is 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.

§§ 552.304 (interested party may submit written comments concerning the availability of requested information), .305 (permitting interested third party to submit to attorney general reasons why requested information should not be released).

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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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).

The OAG explains the communications in Exhibits B - E and the information it marked in Exhibit I are confidential communications among OAG attorneys and staff, and they are made in furtherance of the rendition of professional legal services. The OAG states the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG’s arguments and the submitted information, we agree the communications in Exhibits B - E and the information it marked in Exhibit I constitute

privileged attorney-client communications that the OAG may withhold under section 552.107. Because section 552.107 is dispositive, we do not address the OAG's other arguments for this information.

Next, the OAG asserts Exhibits G and H and the information it marked in Exhibit I are protected from disclosure under section 552.101 in conjunction with section 15.10(i) of the Business and Commerce Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that another statute makes confidential. Section 15.10(i) provides:

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i)(1). The OAG is allowed to release the information only in a limited number of circumstances, as outlined in section 15.10(i). The OAG states Exhibits G and H and the information it marked in Exhibit I were produced in response to a Civil Investigative Demand issued under section 15.10 and that none of the permissive exceptions are applicable. After reviewing the information, we agree the OAG must withhold Exhibit G under section 15.10(i). However, the remaining information is not confidential because the responses merely reiterate the items and information requested by the Civil Investigative Demand, which is not confidential under section 15.10(i) and has been released by the OAG. That is, the remaining information does not constitute documentary material, answers to interrogatories or transcripts of oral testimony, or copies or contents thereof, submitted in response to the Civil Investigative Demand. Thus, the OAG may not withhold Exhibit H or the information it marked in Exhibit I pursuant to section 15.10(i).

We next consider TPI's assertion that section 552.110 of the Government Code excepts Exhibit H and the remaining information in Exhibit I from public disclosure. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. TPI objects to the release of "documents in the possession of the OAG Antitrust Division [that] constitute TPI communications with all retailers, TPI communications with individual retailers, and internal TPI communications." Having reviewed Exhibits H and I, we conclude they are not the types of documents for which TPI asserts are protected by section 552.110. Thus,

the OAG may not withhold Exhibit H and the remaining information in Exhibit I under section 552.110.

Lastly, the requestor argues the OAG may release any confidential information to him because it will be protected by a protective order issued by a Georgia federal district court. The protective order only applies to information produced in the litigation and does not apply to information produced as a result of this open records request. Thus, the order has no bearing on the present matter.

In summary, the OAG may withhold Exhibits B - E and the information it marked in Exhibit I under section 552.107. Also, the OAG must withhold Exhibit G under section 15.10(i) of the Business and Commerce Code. The OAG must release the remainder.

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).

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 'Yen-Ha Le', with a stylized flourish at the end.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 288813

Enc: Submitted documents

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