



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2008

Ms. Lori Fixley Winland
Lock Lord Bissell & Liddell, L.L.P.
100 Congress Avenue, Suite 300
Austin, Texas 78701

OR2008-11863

Dear Ms. Fixley Winland:

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# 320134.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received a request for a list of all payments from the authority to specified individuals, as contractor and subcontractor, as well as all communications pertaining to a specified project. You state that you will release some information. You claim that the submitted information is excepted from disclosure under section 552.104, 552.107, 552.110, and 552.111 of the Government Code. You state that release of the requested information may implicate the proprietary interests of a third-party. You state, and provide documentation showing, that you have notified J.P. Morgan Securities, Inc. ("JP Morgan") of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third-party to raise and explain the applicability of exception to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, you note that some of the information at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-10786 (2008). In this previous letter ruling, this office concluded that the authority must withhold the information at issue pursuant to section 552.104 of the Government Code. Accordingly, we conclude that, as we have no indication that the law, facts, and circumstances on which

the prior letter ruling was based have changed, you must continue to rely on it as a previous determination and withhold Attachment C in accordance with 2008-10786. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With regard to Attachment B, which was not subject to the prior ruling, we will address your arguments against disclosure.

Section 552.107(1) of the Government Code 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 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. TEX. R. EVID. 503(b)(1)(A)-(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. *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 remaining submitted information consists of confidential communications between authority employees and attorneys for the authority. You also state that these communications were made in confidence, in furtherance of the rendition of professional legal services to the authority, and that the communications have remained confidential. Based on our review of your representations and the information at issue, we find that you have demonstrated the applicability of the attorney-client privilege to this information. Accordingly, we conclude that the authority may withhold the remaining information submitted as Attachment B pursuant to 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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).

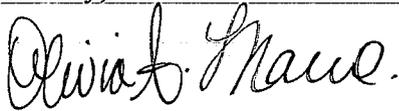
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling,

¹As our ruling is dispositive, we need not address your remaining arguments.

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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/mcf

Ref: ID# 320134

Enc. Submitted documents

c: Mr. Sal Costello
10300 Delea Vista Court
Austin, Texas 78739
(w/o enclosures)

Mr. Don Henderson
JP Morgan
c/o Ms. Lori Fixley Winland
Lock Lord Bissell & Liddell, L.L.P.
100 Congress Avenue, Suite 300
Austin, Texas 78701
(w/o enclosures)