



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2008

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-16165

Dear Ms. Lytle:

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# 328783.

The El Paso County District Clerk (the "district clerk") received a request for the entire file in cause number 2007-2768, any written authority the district clerk is "using as a basis to not file" a specified judge's order, and any written authority the district clerk is "using as a basis to not" provide the requestor with the specified judge's order. You claim that the requested information is not subject to the Act and, in the alternative, you claim the submitted information excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, the district clerk states that the responsive information pertaining to cause number 2007-2768 is not subject to the Act because the district clerk maintains this information on behalf of the judiciary. *See* Gov't Code. § 552.003(1)(B) (definition of governmental body does not include judiciary). Accordingly, the district clerk states that it has not submitted these records for our review. Because the district clerk has not requested a decision from our office on this issue, this ruling does not address the propriety of this determination by the district clerk.

You also assert that the submitted information is a record of the judiciary and, therefore, is not subject to release under the Act. The Act generally requires the disclosure of information

maintained by a “governmental body.” However, while the Act’s definition of a “governmental body” is broad, it specifically excludes “the judiciary.” *See id.* § 552.003(1)(A), (B). In determining whether a governmental entity falls within the judiciary exception to the Act, this office looks to whether the governmental entity maintains the relevant records as an agent of the judiciary in regard to judicial, as opposed to administrative, functions. *See* Open Records Decision No. 646 at 2-3 (1996); *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ). In this instance, the information at issue consists of an e-mail sent from the El Paso County Attorney (the “county attorney”) to the district clerk. Upon review, we find that the submitted information was created and maintained by the district clerk for administrative purposes. Therefore, the submitted information is subject to the Act and may only be withheld if it is excepted from disclosure under the Act.

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 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 a 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). 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.*, 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 the submitted information consists of a confidential communication between the county attorney and the district clerk, the county attorney's client, made for the purpose of rendering professional legal advice to the district clerk. You also state that the confidentiality of the communication has been maintained. Based on these representations and our review of the submitted information, we agree that the submitted information consists of a privileged attorney-client communication that the district clerk may withhold under section 552.107 of the Government Code.

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).

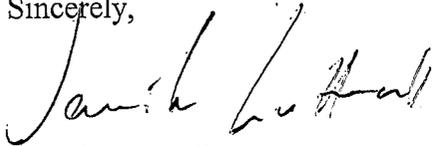
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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, 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, appearing to read "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 328783

Enc. Submitted documents

c: Requestor
(w/o enclosures)