



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2009

Ms. Zindia T. Thomas
Assistant Attorney General
Public Information Coordinator's Office
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2009-02612

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 335982 (PIR No. 08-023894).

The Office of the Attorney General (the "OAG") received a request for the OAG's opinion to the Texas Department of Criminal Justice (the "department") regarding the legality of performing a pat-down search of those entering a prison. The OAG asserts the information is excepted from disclosure under section 552.107 of the Government Code. We have considered the OAG's claimed exception to disclosure and have reviewed the submitted information. We have also received and considered comments from the requestor and the department. *See* Gov't Code § 552.304 (interested party may submit written comments concerning availability of requested information).

First, we address the requestor's statement that the Act requires a governmental body's employee to forward a misfiled request for information to the proper individuals within that agency. In fact, the Act requires that a request for public information sent by electronic mail be submitted to the officer for public information or that person's designee. *Id.* § 552.301(c). Because the requestor's original e-mail request was not sent to the proper person, it was not a valid request pursuant to section 552.301(c). Thus, the recipient of this first request

properly directed the requestor to the officer for public information or that person's designee for submission of his e-mail request for information.

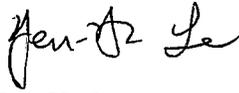
Next, we consider the OAG's section 552.107 assertion. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements 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)(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. *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 states Exhibit B consists of communications between the OAG and its client agency, the department, made in furtherance of the rendition of legal services. Further, 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 OAG may withhold the privileged attorney-client communications in Exhibit B under section 552.107.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 335982

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Ms. Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711-3084
(w/o enclosures)