



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 6, 2009

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2009-06087

Dear Ms. Alexander:

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# 342033.

The Texas Department of Transportation (the "department") received two requests from the same requestor for information related to bulk requestor records.<sup>1</sup> You state that you will release some of the requested information and that the department does not have information in response to portions of the requests.<sup>2</sup> You claim that portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, 552.117, and 552.137 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the

---

<sup>1</sup>The department sought and received a clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

<sup>3</sup>Although you also argue the attorney-client privilege under section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.107 is the appropriate exception. See Open Records Decision No. 676 (2002). Thus, we consider your attorney-client

submitted representative sample of information.<sup>4</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the department's argument that a portion of the request requires the department to answer questions. A governmental body is not required to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We therefore assume the department has made a good faith effort to locate any information that would be responsive to the requestor's inquiries in the present request.

Next, you state that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-03536 (2006). In that ruling, we concluded the department may withhold the submitted e-mails, draft letters, and notes under section 552.107 of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the department may continue to rely on that ruling as a previous determination and withhold those documents in accordance with Open Records Letter No. 2006-03536. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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).

Next, you seek to withhold portions of Exhibit B under section 552.107 of the Government Code. Section 552.107(1) 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

---

privilege arguments only under section 552.107.

<sup>4</sup>We 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.

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). 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 that Exhibit B contains communications sent by and among department attorneys and employees of the department. You also state that the communications in Exhibit B were made in furtherance of the rendition of professional legal services to the department. Finally, you state that the communications were made in confidence and have remained confidential. Based upon your representations and our review, we conclude that the information you have marked in Exhibit B constitutes or documents privileged communications made for the purpose of facilitating the rendition of professional legal services to the department. Therefore, the department may withhold the information you have marked under section 552.107 of the Government Code.<sup>5</sup>

Next, you claim that Exhibit C contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137 (a) - (c). You have marked e-mail addresses in Exhibit C that are not of a type specifically excluded by subsection (c). In addition, you state that the owners of the marked e-mail addresses have not affirmatively consented to their disclosure. Accordingly, the department must withhold the marked e-mail addresses under section 552.137 of the Government Code.

---

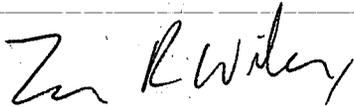
<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against the disclosure of the information in Exhibit B.

In summary, the department may continue to rely on Open Records Letter No. 2006-03536 as a previous determination and withhold the information at issue in Open Records Letter No. 2006-03536 in accordance with that ruling. The department may withhold the information you have marked in Exhibit B under section 552.107 of the Government Code. In addition, the department must withhold the e-mail address you have marked in Exhibit C under section 552.137 of the Government Code. The remaining information must be released.

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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/eeg

Ref: ID# 342033

Enc. Submitted documents

c: Requestor  
(w/o enclosures)