



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2009

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2009-06472

Dear Ms. Soucy:

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# 342992 (Comptroller ID# 5616489651).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for information regarding the requestor that was prepared by a named employee or the comptroller's Human Resources division over a specified time period. You state the comptroller has released some of the requested information. You claim that most of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that portions of the submitted information, which we have marked, are not responsive to the instant request because they were created outside the time period specified in the request. The comptroller need not release nonresponsive information in response to this request and this ruling will not address that information.²

¹We 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.

²As we are able to make this determination, we do not address your arguments under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code against disclosure of this information.

You claim that the information you have marked is excepted from disclosure under section 552.107(1) 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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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).

You state that the information you have marked consists of communications between comptroller attorneys and comptroller employees, and that these communications were made in furtherance of the rendition of legal services and advice for the comptroller. You further state that all of these communications were made in confidence, and that confidentiality has been maintained. You have specifically identified the comptroller attorneys and comptroller

employees at issue. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the information you have marked may generally be withheld under section 552.107.³ However, we note some of the individual e-mails in the submitted e-mail strings were not communications made in furtherance of the rendition of legal services and advice, and, thus, are not privileged. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107, and must be released to the requestor.⁴

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

³As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

⁴We note that the information we have marked contains information subject to common-law privacy and information that may be subject to section 552.117 of the Government Code, to which the requestor has a right of access. *See* Gov't Code §§ 552.023(a), .117; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Therefore, to the extent the marked information exists separate and apart from the attorney-client-privileged e-mail chains, the comptroller should again seek a decision from this office if it receives another request for this information from a different requestor.

Ref: ID# 342922

Enc. Submitted documents

c: Requestor
(w/o enclosures)