



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2009

Mr. Don Redmond
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2009-10640

Dear Mr. Redmond:

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# 350642.

The Texas Commission on Environmental Quality (the "commission") received a request for information relating to the commission's review of an application for a radioactive waste disposal license made by Waste Control Specialists, LLC ("WCS"), including internal memoranda.¹ You state some of the requested information has been released. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of portions of the submitted information may implicate the proprietary interests of WCS. You notified WCS of these requests for information and its right to submit arguments to this office as to why the company's information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have received correspondence from a representative of WCS. We have considered all of the submitted arguments and have reviewed the submitted information.

¹You inform us the commission received clarification of the request. *See* Gov't Code §552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Initially, we address your assertion that Attachment C was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-02521. We presume the facts and circumstances have not changed since the issuance of this prior ruling. To the extent the information at issue is identical to the information previously requested and ruled upon by this office, the commission must withhold or release the information in Attachment C in accordance with Open Records Letter No. 2008-02521. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information not previously requested and ruled upon by this office, we will address your arguments.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.² Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find portions of the information in Attachment E are highly intimate or embarrassing and of no legitimate public interest. Therefore, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 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 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 information in Attachment D reflects or consists of confidential communications between commission staff and attorneys that were made for the purpose of rendering professional legal advice. You also state the confidentiality of the communications has been maintained. Based on these representations and our review of the information at issue, we find the commission may withhold the information in Attachment D under section 552.107 of the Government Code.³

We next address WCS’s claim for exception from disclosure of portions of Attachment E. WCS objects to the release of the marked information based on section 552.110(b) of the Government Code. Section 552.110(b) protects the proprietary interests of third parties by excepting from disclosure commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See Gov’t Code* § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

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

WCS claims release of a portion of its information would reveal the financial health of WCS, its business model, costs, pricing structures, and details of WCS's financing of the disposal project at issue. It claims this information could be used by its competitors to obtain unfair negotiating positions and to enhance relationships with their current clients, thereby limiting WCS's market share in a highly competitive and limited market. Upon review of WCS's arguments and the submitted information, we conclude WCS has made a specific factual or evidentiary showing that release of some of the information at issue would cause it substantial competitive harm. Therefore, the commission must withhold the information we have marked pursuant to section 552.110(b) of the Government Code. Upon review, however, we find WCS has not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information at issue, which includes national market price information and financial information related to WCS's holding company, would cause it substantial competitive harm. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

In summary, the commission must release or withhold the information in Attachment C in accordance with Open Records Letter No. 2008-02521. The commission must withhold the information we have marked in Attachment E under section 552.101 of the Government Code in conjunction with common-law privacy. The commission may withhold the information in Attachment D under section 552.107 of the Government Code. The commission must withhold the information we have marked in Attachment E under section 552.110(b) of the Government Code. The remaining submitted 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, 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,



Karen E. Stack
Assistant Attorney General
Open Records Division

Ref: ID# 350642

Enc. Submitted documents

cc: Mr. Clay Nance
Hance Scarborough, L.L.P.
111 Congress Avenue, Suite 500
Austin, Texas 78701
(w/o enclosures)