



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2009

Ms. Lisa M. Nieman
Assistant General Counsel
Office of General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-13579

Dear Ms. Nieman:

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# 356534 (DSHS file 015702-2009).

The Texas Department of State Health Services (the "department") received a request for information related to Dishaka Gourmet Imports, L.L.C. ("Dishaka"), and a named individual for a particular time period. You claim that some of the requested information is excepted from disclosure under sections 552.107 and 552.110 of the Government Code and under federal law. Additionally, you state that the request may involve third party proprietary interests and provide documentation showing that you notified Dishaka of the request for information and of its opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered your claims and reviewed the submitted information, some of which consists of a representative sample.¹

Although the department argues that some of the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests

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.

of third parties, not the interests of a governmental body. Thus, we do not address the department's arguments under section 552.110. We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Dishaka explaining why the information at issue should not be released. We thus have no basis for concluding that any portion of the requested information constitutes Dishaka's proprietary information, and none of it may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next, we will address your claim that some of the requested information is excepted from disclosure pursuant to federal law. You state that the United States Food and Drug Administration (the "FDA") contracts with the department to conduct inspections under authority of federal law and that the inspections are conducted by department employees who are commissioned officers of the FDA. You inform this office that the inspection reports created by the department are then submitted to the FDA. You assert that the FDA has informed the department that the reports and any information obtained from the inspections are confidential pursuant to sections 301 and 331(j) of title 21 of the United States Code. Further, you state "[t]he inspection report [at issue] was conducted by an investigator of [the department] as a credentialed commissioned officer of the FDA, therefore, this complaint and investigation report are being withheld pursuant to" these federal confidentiality provisions.

Sections 301 and 331(j) of title 21 of the United States Code provide that the Federal Food, Drug, and Cosmetic Act prohibits the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. You also refer to section 20.85, title 21, of the Code of Federal Regulations, which states:

Any Food and Drug Administration record otherwise exempt from public disclosure may be disclosed to other Federal government departments and agencies, except that trade secrets and confidential commercial or financial information prohibited by 21 U.S.C. § 331(j), 21 U.S.C. § 360(j)(c), 42 U.S.C. § 263g(d) and 42 U.S.C. § 263i(e) may be released only as provided by those sections. Any disclosure under this section shall be pursuant to a written agreement that the record shall not be further disclosed by the other department or agency except with the written permission of the Food and Drug Administration.

21 C.F.R. § 20.85. You assert that these federal provisions also prohibit this office from reviewing any documents that may be responsive to this request. Because you have not

provided this office the documents at issue for review, we are unable to make any determination regarding such documents.

You assert that the information submitted in Exhibit B is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information that falls 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. *See* 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 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)-(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). This means the communication 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 pet.). 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 contend that the information you have marked constitutes communications between and among attorneys and employees of both the department and the Office of the Attorney General. You state that these communications were made for the purpose of rendering professional legal services to the department. You also state that these communications were confidential when made and have remained confidential. Based upon your representations and our review of the information at issue, we agree that some of the information you have marked constitutes privileged attorney-client communications and the department may withhold this information on that basis under section 552.107 of the Government Code.

However, you have failed to demonstrate that the submitted draft pleading is a communication between privileged parties. Therefore, the department may not withhold this document, which we have marked, under section 552.107. As you claim no other exception to disclosure of the draft pleading, it must be released to the requestor. We have marked the information in Exhibit B that may be withheld under section 552.107.

We note that some of the remaining information is excepted under 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). See Gov't Code § 552.137(a), (b). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). See Act of May 15, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 651, 651-52, amended by Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, 2009 Tex. Sess. Law Serv. 2555, 2557 (Vernon) (to be codified as an amendment to Gov't Code § 552.137(c)). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the remaining documents. Therefore, the department must withhold the e-mail addresses we have marked in accordance with section 552.137, unless the department receives consent for their release.

In summary, the department may withhold the information we have marked under section 552.107 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless it receives consent for their release. The remaining information must be released to the requestor.

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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 356534

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)