ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2010

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2010-00823

Dear Mr. Hargrove:

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# 367435.

The Office of the Attorney General (the "OAG") received a request for Appendix 1 attached to Representative Frank J. Corte Jr.'s request for an attorney general opinion, RQ-0829-GA. The OAG does not object to release of the information but has submitted this request for a ruling because the Texas Department of State Health Services (the "department") does object to release of the information. The department asserts section 552.107 of the Government Code excepts the information from public disclosure. We have considered the department's claimed exception to disclosure and have reviewed the submitted information.

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).

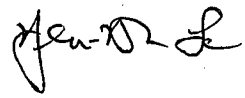
The information at issue consists of an e-mail string starting with e-mails between a department employee and a public citizen, an e-mail between department employees, and culminating in e-mails between a department attorney and former department employees. A review of the communications shows Rep. Corte quoted one exchange fully in his request for an attorney general opinion, and Rep. Corte's letter containing said communication has been posted on the OAG's website since October 2009. Given these facts, this office asked the department to explain the circumstances under which the communication was released and how Rep. Corte obtained it. *See* Gov't Code § 552.303(c) (attorney general may obtain additional information necessary to render decision). The department's response states it has "no information to indicate that the e-mail was released to Rep[.] Corte or his office," and it is unknown "how the Representatives' [sic] office obtained the e-mail." Furthermore, the department asserts its employees were not authorized to release the communication. However, in order for the privilege to apply, the communication must be confidential, 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." TEX. R. EVID. 503(a)(5). The e-mails at issue do not clearly reflect the parties had such an intent, and the department's representations do not adequately demonstrate such an intent. Furthermore, the department's representations do not adequately demonstrate it maintained the confidentiality

of the communication. Thus, because the department failed to demonstrate 1) the communication was not intended to be disclosed to a third person and 2) the confidentiality of the communication has been maintained, the OAG may not withhold the requested information under section 552.107 of the Government Code. Accordingly, the OAG must release the requested information.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 367435

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347
(w/o enclosures)