



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 18, 2010

Ms. Dolores Alvarado Hibbs  
General Counsel  
Ms. Lisa Hoyt  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR2010-02491

Dear Ms. Hibbs and Ms. Hoyt:

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# 370511 (TDA-PIR-10-169).

The Texas Department of Agriculture (the "department") received a request for information pertaining to department Case No. 00004911. You state the department has released most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information 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

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<sup>1</sup>You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503 and under the attorney work product privilege based on Texas Rule of Civil Procedure 192.5. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503, and section 552.111, rather than rule 192.5. Open Records Decision No. 676 at 3 (2002). Further, although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. See Gov't Code § 552.022.

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 a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. Finally, 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 the definition of a confidential communication 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 inform us that the submitted information consists of an internal recommendation prepared by a department case preparation officer under the direction of a department attorney “for the purpose of analyzing the case and evaluating the evidence and law regarding alleged violations of Texas pesticide law” for the department’s review. You indicate this communication was intended to be and has remained confidential. Having considered your representations and reviewed the information at issue, we agree that the submitted information constitutes a privileged attorney-client communication. Therefore, the submitted information may be withheld pursuant to section 552.107(1) of the Government Code.<sup>2</sup>

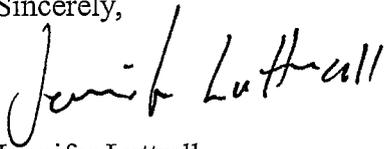
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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

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

Sincerely,

A handwritten signature in black ink that reads "Jennifer Luttrall". The signature is written in a cursive, flowing style.

Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 370511

Enc. Submitted documents

c: Requestor  
(w/o enclosures)