



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2010

Ms. Caroline E. Cho
Assistant County Attorney
Williamson County
405 Martin Luther King Street, Box 7
Georgetown, Texas 78626

OR2010-12455

Dear Ms. Cho:

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# 390758.

Williamson County and the Williamson County Attorney's Office (collectively the "county") received two requests from the same requestor for nine categories of information pertaining to the T. Don Hutto Residential Facility. You state the county has released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. In addition, you assert that release of some of the submitted information may implicate the interests of the United States Department of Homeland Security Immigration and Customs Enforcement ("ICE"). Accordingly, you state you notified ICE of this request for information and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from ICE. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that in its comments to this office, ICE states it does not object to release of the information at issue. Accordingly, the county may not withhold any of the submitted information based upon the interests of ICE.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Gov't Code § 552.101. You raise section 552.101 in conjunction with section 236.6 of title 8 of the Code of Federal Regulations.¹ Section 236.6 of title 8 provides as follows:

No person, including any state or local government entity or any privately operated detention facility, that houses, maintain, provides, services to, or otherwise holds any detainee on behalf of the [Immigration and Naturalization] Service [(the "INS")] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee.² Such information shall be under the control of [the INS] and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

8 C.F.R. § 236.6. You inform us that some of the submitted information pertains to "federal detainees being housed in the T. Don Hutto Residential Facility." Based on your arguments and our review of the information in question, we agree that the county is required to abide by rules promulgated by the INS with regard to INS detainees. *See* 8 C.F.R. § 2.1 (providing that Secretary of Homeland Security may issue regulations to administer and enforce laws relating to immigration and naturalization of aliens); *see also American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. 2002) (stating that while state possesses sovereign authority over operation of its jails, it may not operate them, in respect to INS detainees, in any way that derogates federal government's exclusive and expressed interest in regulating aliens). We therefore conclude that the information you have marked is made confidential by section 236.6 of title 8 of the Code of Federal Regulations and must be withheld from the requestor under section 552.101 of the Government Code. *See ACLU*, 799 A.2d at 655 (concluding that because INS had authority to promulgate 8 C.F.R. § 236.6, provision preempts state law requiring disclosure of requested information); *see also English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *Louisiana Pub. Serv. Comm'n v. FCC*, 476

¹Section 552.101 encompasses information that other statutes make confidential. A federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

²We note that the functions of the INS were transferred to the Department of Homeland Security on March 1, 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). However, as section 236.6 still refers to the agency at issue as "the INS," we will also do so in this ruling.

U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation).

You assert the information you have marked is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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 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 state that the information you have marked constitutes communications between county attorneys, county commissioners, and county employees that were made for the purpose of rendering professional legal advice to the county. You state further that these communications were made in confidence and have maintained their confidentiality. You have identified the privileged parties to these communications. Based on your

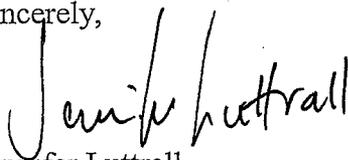
representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked. Accordingly, the county may generally withhold the marked information under section 552.107 of the Government Code. However, we note, and you acknowledge, that some of the submitted e-mail strings include communications with non-privileged parties. If the communications with these non-privileged parties, which we have marked, exist separate and apart from the e-mail strings in which they appear, then the county may not withhold the communications with the non-privileged parties under section 552.107(1).

In summary, the county must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 236.6 of title 8 of the Code of Federal Regulations. The county may withhold the information you marked under section 552.107 of the Government Code; however, to the extent the non-privileged e-mails we marked exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107. The remaining 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 390758

Enc. Submitted documents

c: Requestor
(w/o enclosures)