



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2010

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2010-13483

Dear Mr. Norbraten:

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# 392584 (Internal Tracking No. 2010SOLEG00107).

The Texas Department of Aging and Disability Services (the "department") received a request for information relating to a video surveillance project for state-supported living centers, RFO # 539-09-45411, and the resulting contract with Knight Security Systems ("Knight"). You claim that some of the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ Although you take no position on the public availability of the rest of the submitted information, you believe that the remaining information may implicate Knight's proprietary interests. You inform us that Knight was notified of this request for information and of its right to submit arguments to this office as to why the information should not be released.² We have considered the exception you claim and reviewed the information you submitted.

¹As the department also initially raised sections 552.101 and 552.111 of the Government Code, but has submitted no arguments in support of the applicability of those exceptions, this decision does not address sections 552.101 and 552.111. See Gov't Code §§ 552.301(e)(1)(A), .302.

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

We first note that the department received two previous requests for the bid proposals submitted in response to RFO # 539-09-45411, as a result of which this office issued Open Records Letter No. 2010-04582 (2010). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, the department must dispose of any information encompassed by Open Records Letter No. 2010-04582 that is responsive to the instant request in accordance with our previous ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We also note that the department does not appear to have submitted other information that would be responsive to the instant request for information, including information that was released in response to the requests that resulted in Open Records Letter No. 2010-04582. We therefore assume that the department has released any other information responsive to the instant request that existed when the department received the request. If not, then any such information must be released immediately. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We next note that some of the submitted information was created after the date of the department's receipt of the instant request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.³ Thus, the submitted information that did not exist when the department received the instant request is not responsive to the request. We have marked representative samples of the non-responsive information in Exhibit A and other non-responsive information in Exhibit B. This decision does not address the public availability of the marked information, which need not be released in response to the instant request.

Next, we address the department's claim 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. *See* 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. *See 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 capacity other than that of attorney).

³*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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. 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. See *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 claim the attorney-client privilege under section 552.107(1) for all of the responsive information in Exhibit A. You state that the information at issue consists of confidential communications between attorneys for and representatives of the department and the Texas Health and Human Services Commission. You explain that these individuals have statutory authority to perform administrative duties in contractual matters pursuant to the reorganization of state health and human services agencies under House Bill 2292. See HB 2292, 78th Leg., R.S. (2003). You have identified some of the parties to the communications. You state that the confidentiality of the communications has been maintained. Based on your representations and our review of the information at issue, we conclude that the responsive information in Exhibit A may generally be withheld under section 552.107(1) of the Government Code. We note, however, that some of the e-mails in Exhibit A involve non-privileged parties. Those e-mails, which we have marked, may not be withheld under section 552.107(1) and must be released. We also note that many of the e-mail strings in Exhibit A include individual e-mails that involve non-privileged parties. To the extent that those e-mails, which we also have marked, exist separate and apart from the e-mail strings, they may not be withheld under section 552.107(1) and must be released.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. See Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Knight. Therefore, because Knight has not demonstrated that any of the information at issue is proprietary for the purposes of the Act, the department

may not withhold any of the remaining responsive information on the basis of any interest that Knight may in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

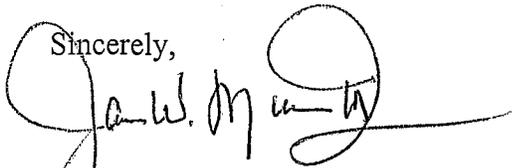
Lastly, we note that some of the responsive information in Exhibit B appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1978); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary: (1) the department must dispose of any information encompassed by Open Records Letter No. 2010-04582 that is responsive to the instant request for information in accordance with our previous ruling; and (2) the responsive information in Exhibit A may generally be withheld under section 552.107(1) of the Government Code, but the department must release the marked e-mails that involve non-privileged parties, including the marked e-mails in e-mail strings that exist separate and apart from the e-mail strings. The department also must release the rest of the responsive information, but any copyrighted information may only be released in compliance with copyright law.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 392584

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Chris Hugman
Knight Security
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Austin, Texas 78735
(w/o enclosures)