ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2010

Mrs. Sylvia F. Hardman-Dingle
General Counsel
Texas Department of Assistive and Rehabilitative Services
4800 North Lamar Boulevard, Suite 300
Austin, Texas 78756

OR2010-17780

Dear Mrs. Hardman-Dingle:

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# 402423 (PIA Request No. 2010 09/03-1).

The Texas Department of Assistive and Rehabilitative Services (the "department") received a request for a personnel file and any and all documentation relating to a specified individual.[1] You state the department has released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and under Texas Rule of Evidence 503.[2] We have considered your arguments and reviewed the submitted information.

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[1]You state the board received clarification from the requestor regarding this request. *See* Gov't Code § 552.222(b) (providing that if large amount of information has been requested, governmental body may discuss with requestor how scope of request might be narrowed); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when government entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

[2]We note discovery privileges under the Texas Rules of Evidence ,such as the attorney-client privilege, does not make information confidential for the purpose of section 552.101 of the Government Code, and therefore should not be asserted under section 552.101. Open Records Decision Nos. 676 at 1-3 (2002), 575 at 2 (1990).

You state the marked e-mails are subject to section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 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 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). 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.*, 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 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). We note communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state the responsive e-mails you have marked were communicated among attorneys, officials, and employees from the department and consultants from the Texas Health and Human Services Commission for the purpose of facilitating the rendition of legal services to the department. You further state these e-mails were intended to be, and have remained, confidential. Based on your representations and our review, we find most of the responsive e-mails you have marked constitute privileged attorney-client communications the

department may withhold under section 552.107(1) of the Government Code. However, we note one of the e-mail strings you have marked includes e-mails which were not made in furtherance of the rendition of legal services and are separately responsive to the instant request. If these e-mails, which we have marked, exist separately and apart from the e-mail string in which they appear, then the department may not withhold them under section 552.107 of the Government Code.

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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eeg

Ref: ID# 402423

Enc. Submitted documents

c: Requestor
(w/o enclosures)