ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 30, 2010

Ms. Elinore Tecson
Employment Attorney
Texas Commission in Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2010-17924

Dear Ms. Tecson:

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# 401441.

The Texas Commission on Environmental Quality (the "commission") received a request for the requestor's dismissal letter, the commission's "do not hire" list, any and all circumstances of a named employee's removal from his position, all documents and records that reference the requestor during and before his tenure at the commission on four named employees' computers, and all electronic transmissions on a named employee's Blackberry from January 1, 2010 to present.[1] You state the commission has released some information to the requestor and will release additional information to the requestor upon his response to a cost estimate. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]You state the commission sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

[2]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note the commission did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request." Gov't Code § 552.301(b). In this instance, you state the commission received the original request for information on August 30, 2010 and the clarified request for information on September 15, 2010. While the commission raised sections 552.107 and 552.139 within the ten-business-day time period as required by subsection 552.301(b), the commission did not raise section 552.108 until September 30, 2010, which is after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.108 is a discretionary exception to disclosure which protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver); 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the interest under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 586 (1991), 469 (1987). You inform us, and have provided documentation showing, that the Federal Bureau of Investigation (the "FBI") asserts an interest in a portion of the information at issue. Therefore, we will consider whether the commission may withhold this information under section 552.108 on behalf of the FBI. We will also consider the applicability of your timely raised exceptions to the remaining 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 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). 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.* 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 a portion of the submitted information, which you have labeled Attachment E, consists of correspondence between the commission's in-house attorneys and commission management concerning the attorneys' legal conclusions, advice, opinions, analysis, and recommendations rendered to the commission regarding employment matters. You state these communications were used to facilitate the rendition of legal advice to commission management. You state the communications were confidential and that confidentiality has been maintained. Upon review, we conclude the information in Attachment E constitutes privileged attorney-client communications. Thus, the commission may withhold Attachment E under section 552.107 of the Government Code.

Section 552.108 of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You have provided a statement from an agent with the FBI stating the information in Attachment G relates to an ongoing criminal investigation. Based on this representation and our review, we find that release of the information in Attachment G would interfere with the detection, investigation or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, the commission may withhold Attachment G under section 552.108(a)(1) on behalf of the FBI.

Section 552.139 of the Government Code provides:

> (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.
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> (b) The following information is confidential:
>
> > (1) a computer network vulnerability report; and
> >
> > (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

Gov't Code § 552.139. Section 2059.055 of the Government Code provides in pertinent part:

> (b) Network security information is confidential under this section if the information is:
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> > (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
> >
> > (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
> >
> > (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state the information in Attachment F relates the security of the commission's computer network. You state that this information was created in order to aid management and specific management employees in the management of the commission's network. Upon review of your arguments and the submitted information, we conclude the commission must withhold the information we have marked in Attachment F under section 552.139 of the Government Code. However, we find you have failed to demonstrate that any of the remaining information in Attachment F relates to computer network security, restricted information under section 2059.055 of the Government Code, or to the design, operation, or defense of a computer network for purposes of section 552.139(a). Furthermore, you have not demonstrated that the remaining information consists of a

computer network vulnerability assessment or report, as contemplated by section 552.139(b). Accordingly, the commission may not withhold any of the remaining information under section 552.139 of the Government Code.

In summary, the commission may withhold Attachment E under section 552.107 of the Government Code. The commission may withhold Attachment G under section 552.108(a)(1) of the Government Code. The commission must withhold the information we have marked in Attachment F under section 552.139 of the Government Code. 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,

Kate Hartfield

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 401441

Enc. Submitted documents

c: Requestor
(w/o enclosures)