ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2011

Ms. Jennifer Soldano
Legal Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

OR2011-04725

Dear Ms. Soldano:

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# 413953.

The Texas Department of Motor Vehicles (the "department") received a request for thirteen categories of information pertaining to the requestor's employment with the department. You state you will make some of the requested information available to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* ORD 676 at 1-2.

[2]We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, you state certain information responsive to category 1 of the request for e-mails between the requestor and a named individual during a specified time period, including deleted e-mails, and certain information responsive to category 12 of the request for every single document regarding the requestor during a specified time period, are not maintained by the department. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You indicate some of the responsive information has been deleted from the department's computers, and you state the information at issue is stored offsite on backup tapes.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state the department does not maintain some of the requested information because it is stored offsite on backup tapes that are created through Team for Texas (IBM). We understand you to claim the information is not maintained on hard drives of the department's computers or on the department's servers. You state the department does not have a way to search the backup tapes electronically for responsive information or to separate out the responsive information. Based on your representations, we determine the locations of the files have been deleted from the FAT system. Accordingly, we find that the deleted information was no longer being "maintained" by the department at the time of the request, and is not public information subject to disclosure under the Act. *Bustamante* at 266; *see also* Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude in this instance, the Act does not require the department to recover and release any information that was stored only remotely on the department's backup tapes on the date the present request was received.

Section 552.107(1) of the Government Code 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 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). 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. *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 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 portions of the submitted information, which you have marked, consist of e-mails and draft documents that were communicated between department attorneys and department employees. You state these communications were made in furtherance of providing professional legal service to the department. You state these communications were confidential, and you indicate the department has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the marked information. Accordingly, the department may withhold the marked information under section 552.107 of the Government Code.[3] The remaining information must be released.

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[3]As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

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,

Claire Morris Sloan

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 413953

Enc. Submitted documents

c: Requestor
(w/o enclosures)