



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2011

Ms. Ashley R. Allen
Staff Attorney- Administrative Law Section
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2011-06578A

Dear Ms. Allen:

This office issued Open Records Letter No. 2011-06578 (2011) on May 12, 2011. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 12, 2011.

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 417409.

The Texas General Land Office (the "GLO") received a request for the report related to the requestor's termination. You state the GLO has released some of the requested information, but claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note Attachments B and C pertain to a completed investigation. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is

¹Although you also raised sections 552.102, 552.103, 552.104, 552.105, 552.110, 552.113, 552.117, 552.130, 552.136, 552.137, and 552.147 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume you no longer assert any of these exceptions. *See* Gov't Code §§ 552.301, 552.302.

excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.111 is a discretionary exception to disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision No. 663 at 5 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, it is not other law that makes information confidential for the purposes of section 552.022; therefore, the GLO may not withhold this information under section 552.111. However, section 552.101 constitutes other law for purposes of section 552.022. Therefore, we will therefore consider your arguments under section 552.101 for this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Attachments B and C pertain to a sexual harassment investigation. Attachment C is an adequate summary of an investigation into alleged sexual harassment. The summary is, thus, not confidential in its entirety. However, information within these documents identifying a victim and witnesses, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840

S.W.2d at 525. The GLO must release the remaining information in Attachment C to the requestor. The GLO must withhold Attachment B in its entirety under section 552.101 in conjunction with common-law privacy.² *See id.*

You assert Attachment D is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 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). 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. 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).

You explain Attachment D consists of confidential communications between and among attorneys for and employees of the GLO that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments

²As we are able to resolve this matter under section 552.101, we do not address your other argument for exception of this information.

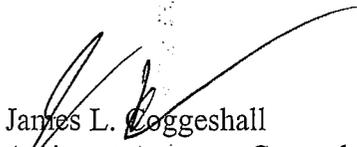
and the submitted information, we agree Attachment D constitutes privileged attorney-client communications that the GLO may withhold under section 552.107(1).

To conclude, the GLO must withhold Attachment B in its entirety and the information we have marked in Attachment C under section 552.101 of the Government Code in conjunction with common-law privacy. The GLO may withhold Attachment D under section 552.107(1) of the Government Code. The GLO must release the remaining information.³

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,



James L. Loggesshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 417409

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a right of access to information in the submitted documents that otherwise would be excepted from release under the Act. *See* Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Thus, the GLO must again seek a decision from this office if it receives a request for this information from a different requestor.