



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2011

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2011-13648

Dear Mr. Smith:

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# 430561.

The Texas Health and Human Services Commission (the "commission") received a request for information related to a specified investigation. You state you will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted 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.*, 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 the information in Exhibit C consists of communications between and among attorneys for the commission, employees of the commission, and employees of the Department of State Health Services (“DSHS”). You explain the commission is authorized by statute to provide legal services to DSHS and regulate employment practices and procedures at DSHS. You explain DSHS has a common interest with the commission in the legal matter at issue. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b (2000) (persons who have common interests may coordinate their positions without destroying privileged status of their communications with their lawyers). You state these communications were made for the purpose of facilitating the rendition of legal services. You indicate these communications were made in confidence and have remained confidential. Based on your representations and our review, we find the information in Exhibit C consists of attorney-client privileged communications. Accordingly, the commission may withhold the information in Exhibit C under section 552.107(1) of the Government Code.<sup>1</sup>

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. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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. *See id.* at 683. You claim the information in Exhibit B is subject to common-law privacy. Upon review, we find that no portion of the information at issue to be highly intimate or embarrassing and of no legitimate concern to the public. Consequently, no portion of the information in Exhibit B may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the commission may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employees whose personal information is at issue timely elected to keep their personal information confidential, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The commission may not withhold this information under section 552.117(a)(1) if the employees whose personal information is at issue did not make timely elections to keep their personal information confidential.

In summary, the commission may withhold the information in Exhibit C under section 552.107(1) of the Government Code. If the employees whose personal information is at issue timely elected to keep their personal information confidential, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The commission may not withhold this information under section 552.117(a)(1) if the employees whose personal information is at issue did not make timely elections to keep their personal information confidential. 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](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 'VB', with a long horizontal flourish extending to the right.

Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 430561

Enc. Submitted documents

c: Requestor  
(w/o enclosures)