



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 22, 2011

Mr. Justin Gordon  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2011-13715

Dear Mr. Gordon:

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# 431975 (OOG ID# 303-11).

The Office of the Governor (the "governor") received a request for correspondence to and from the governor regarding a named person during a specified time.<sup>1</sup> You state you have released most of the information to the requestor. We note you have redacted personal e-mail addresses under section 552.137 of the Government Code.<sup>2</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. You also state you have notified the Texas Board of Pardons and Paroles (the "board") of the request and its right to submit arguments to this office. *See* Gov't Code § 552.304 (interested party may submit comments stating why information

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<sup>1</sup>You state, and provide documentation showing, the governor sought and received clarification of the request. *See* Gov't Code § 522.222(b) (stating if information requested is unclear or large amount 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 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad 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).

<sup>2</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

should or should not be released). We have received comments from the board. We have considered the claimed exceptions and reviewed the submitted information.

Initially, you state the information you have marked in Exhibit B was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-13219 (2011). In that ruling, we held the information at issue could be withheld under section 552.107(1) of the Government Code. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the governor may continue to rely on Open Records Letter No. 2011-13219 as a previous determination and withhold the information subject to that ruling in accordance with it. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We next address the arguments against disclosure of the remaining information not subject to our previous ruling. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Govt’ Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. You and the board both raise section 552.101 in conjunction with section 508.313 of the Government Code for Exhibit C. Section 508.313 provides in relevant part:

(a) All information obtained and maintained [by the Texas Department of Criminal Justice], including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the Texas Department of Criminal Justice] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) The [Texas Department of Criminal Justice], on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

- (1) the governor;
- (2) a member of the board or a parole commissioner;
- (3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or
- (4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

*Id.* § 508.313(a), (c). Section 508.313 requires the Texas Department of Criminal Justice to transfer information to the board and the governor for consideration in clemency matters; such a transfer does not affect the confidentiality of the information. *See id.* § 508.313(c). You state the information in Exhibit C was transferred by the board to the governor for consideration in a clemency matter. Accordingly, we find Exhibit C is confidential under section 508.313 of the Government Code and must be withheld under section 552.101 of the Government Code.

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. 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). 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, orig. proceeding). 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 assert the remaining information you have marked in Exhibit B consists of communications between individuals you have identified as employees of and attorneys for the governor. You state the communications were made for the purpose of facilitating the rendition of legal services and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the governor may withhold the remaining information you have marked in Exhibit B under section 552.107 of the Government Code.

In summary, the governor may withhold the information that was subject to Open Records Letter No. 2011-13219. The governor must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. The governor may withhold the remaining information you have marked in Exhibit B under section 552.107 of the Government Code.

The board asks this office to issue a previous determination permitting the board to withhold correspondence between the board and the governor's office concerning the board's recommendations regarding clemency under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code, without the necessity of requesting a ruling from our office under the Act. We decline to issue such a previous determination at this time. Accordingly, 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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/agn

Ref: ID # 431975

Enc. Submitted documents

c: Requestor  
(w/o enclosures)