



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2011

Mr. Jeffrey R. Crownover
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2011-15055

Dear Mr. Crownover:

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# 433136 (PIA 7.24.11).

The DeSoto Independent School District (the "district"), which you represent, received a request for (1) all information pertaining to a named individual's employment with the district, (2) any arrangements including travel, employment, or other expenses of individuals considered for employment at the named individual's request, (3) the status of the named individual including the arrangements for "paid leave," (4) information pertaining to a specified job posting, and (5) all reports and correspondence between the search company who recommended the named individual and the district. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us the district requested clarification of a portion of the first category of information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). As of the date of this letter, you have not indicated the district has received a response to its request for clarification. Accordingly, the district has no obligation at this time to release any information that might be responsive to this portion of the request. However, if the district receives clarification, and wishes to withhold any of the information encompassed by the clarified request, you must request another decision from this office at that time. *See*

id. §§ 552.301, .302; 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).

Next, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-14156 (2011). There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, we conclude the district must continue to rely on Open Records Letter No. 2011-14156 as a previous determination and withhold or release the previously ruled upon information in accordance with the prior ruling. 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will consider your arguments for the requested information that was not the subject of the previous ruling.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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 Texas 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, 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.*, 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). Section 552.107(1) generally excepts an entire communication 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). We note communications with third party consultants with which a governmental body shares a privity of interest are protected under section 552.107. Open Records Decision Nos. 464 (1987), 429 (1985). However, a governmental body does not share a privity of interest with a third party when it is involved in contract negotiations, as the parties’ interests are adverse.

You state the e-mails submitted in Exhibit B consist of communications involving attorneys for the district, employees and representatives of the district, and the named individual and her attorney, with whom, you assert, the district shares a common interest. You state these communications were made in furtherance of the rendition of professional legal services to the district. You state these communications were confidential, and you state the district has not waived the confidentiality of the information at issue. However, we note the submitted e-mail communications consist, in part, of contractual negotiations between the district, the named individual, and her attorney, about a proposed contract between the district and the named individual. Because these parties were negotiating the terms of the contract, their interests in these communications were adverse at the time the communications were made. Accordingly, until the time the contract was executed by both parties, we find the parties did not share a common interest that would allow the attorney-client privilege to apply to the communications. *See* TEX. R. EVID. 503(b)(1)(c); *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Therefore, you have failed to demonstrate how communications between the district, the named individual, and her attorney that were made prior to the execution of the contract consist of communications between privileged parties. *See* TEX. R. EVID. 503(b)(1)(c). Further, we find the remaining information you seek to withhold in Exhibit B, which consists of e-mails sent after the execution of the contract, was shared with the named individual’s attorney, whom you have not demonstrated was a privileged party with interests common to those of the district. Accordingly, we find section 552.107 does not apply to Exhibit B, and the district may not withhold Exhibit B under section 552.107 of the Government Code.

We note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code.¹ Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

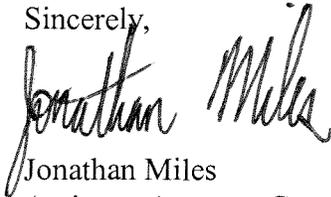
body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its release.

In summary, the district must continue to rely on Open Records Letter No. 2011-14156 as a previous determination and withhold or release the previously ruled upon information in accordance with the prior ruling. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its release. 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 433136

Enc. Submitted documents

c: Requestor
(w/o enclosures)