



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2011

Mr. Ryan S. Henry
Ms. Jennafer G. Tallant
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2011-17962

Dear Mr. Henry and Ms. Tallant:

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# 437944.

The Dallas County Hospital District (the "district"), which you represent, received a request for information related to complaints regarding inspectors who participated in a recent inspection or re-inspection of Parkland Memorial Hospital. You state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹ We also have considered the comments we received from an attorney for the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Among other things, the requestor contends the district did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See id.* § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to this office, no later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information at issue; (2) a copy of the request for information; (3) a signed statement of the date of the governmental body's receipt of the request or evidence sufficient to establish the date of receipt; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information from the public. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). We note the district's claims under sections 552.107(1) and 552.111 of the Government Code are not compelling reasons for non-disclosure under section 552.302. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver).

The district informs us that, after receiving the present request for information on September 13, 2011, the district requested clarification from the requestor on September 22 and received the requestor's response on September 27. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). In *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010), the Texas Supreme Court held that when a governmental body, 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. *See id.* at 384. Taking September 27, the date of the district's receipt of the requestor's response to its request for clarification, as the date of the district's receipt of the present request for information, the district's communications with this office were timely for purposes of section 552.301 of the Government Code. In this instance, however, the requestor's attorney contends the district did not act in good faith in seeking clarification of the request. Whether the district acted in good faith in requesting clarification is a question of fact. This office cannot resolve factual issues in the decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body that is requesting our decision or on those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Having considered the district's representations and documentation, we cannot conclude the district failed to act in good faith in requesting clarification. Thus, the district complied with section 552.301 of the Government Code in requesting this decision, and we will consider its claims under sections 552.107(1) and 552.111 of the Government Code.

Section 552.107(1) 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* ORD 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. *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 is 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 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. *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 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).

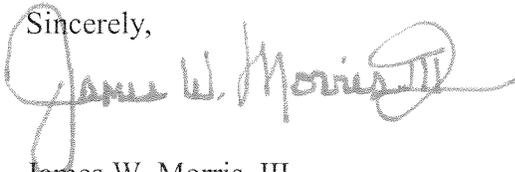
The district claims all the submitted information is excepted from disclosure under section 552.107(1). The district indicates this information either constitutes or documents communications between or among attorneys for and representatives of the district. The district has identified most of the parties to the communications. The district states the communications were made for the purpose of facilitating the rendition of professional legal services. The district also states the communications were intended to be and remain confidential. Having considered the district’s representations and reviewed the information at issue, we note some of the information consists of communications with representatives of the Texas Department of State Health Services (the “DSHS”). We have marked that information. As the district has not demonstrated the DSHS representatives are privileged parties, the district may not withhold the marked communications with DSHS representatives under section 552.107(1) of the Government Code. Thus, as the district claims no other exception to disclosure of those communications, they must be released. With the exception

of the marked information, we conclude the district may generally withhold the submitted information under section 552.107(1).² We also note, however, that communications with DSHS representatives are attached to one of the submitted e-mail strings. To the extent those communications, which we also have marked, exist separate and apart from the e-mail string, they may not be withheld under section 552.107(1) and 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 437944

Enc: Submitted documents

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(w/o enclosures)

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²As we are able to make this determination, we need not address your claim under section 552.111 of the Government Code.