



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2011

Ms. Mary Salluce
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2011-18574

Dear Ms. Salluce:

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# 439209 (DFPS #2011-0197).

The Texas Department of Family and Protective Services (the "department") received a request for (1) all information pertaining to an inquiry about a named individual made between Senator Whitmire and department employees or contractors during a specified time period; (2) all information pertaining to an inquiry about a named individual made between any elected or appointed official or any employee or contractor for any Texas governmental entity and department employees or contractors during a specified time period; and (3) any written information pertaining to a named individual and her position and/or job duties during a specified time period. You state you have released some of the responsive information, including all information responsive to category three of the request. You also believe some of the remaining responsive information may implicate the interests of Senator Whitmire; thus, you have notified the senator of the request for information. You claim the public availability of some of the submitted information is governed by sections 306.003 and 306.004 of the Government Code. You also claim that 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, we note one of the documents in Exhibit C is not responsive because it is a copy of the request for information at issue. This ruling does not address the public availability of

any information that is not responsive to the request, and the department need not release such information.

You state you will withhold information in Exhibit C that Senator Whitmire identifies as subject to withholding under sections 306.003 and 306.004 of the Government Code. Section 306.003 provides as follows:

(a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

(b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

Gov't Code § 306.003. We note the submitted information consists of department records, rather than those of Senator Whitmire. Section 306.003 pertains to only records of a member of the legislature or the lieutenant governor. *See id*; Open Records Decision No. 648 (1996). You have not demonstrated that the information submitted by the department consists of “[r]ecords of a member of the legislature or the lieutenant governor[.]” Gov’t Code § 306.003(a). We therefore conclude that section 306.003 does not apply to any of the information in Exhibit C.

While section 306.003 applies to records of memoranda of communications and records of personal information of a legislator or the lieutenant governor, section 306.004 refers to the communications themselves and provides as follows:

(a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:

- (1) the citizen expressly or by clear implication authorizes the disclosure;
- (2) the communication is of a type that is expressly authorized by statute to be disclosed; or

(3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.

(b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.

(c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

Id. § 306.004. For the purposes of section 306.004, a “communication” includes “conversation, correspondence, and electronic communication.” *Id.* § 306.001. The communication is not subject to public disclosure unless one of the three conditions stated in section 306.004(a) applies. *See id.* § 306.004(a)(1)-(3). We note that a legislator has the discretion to disclose all or part of records that are subject to section 306.004(a). *Id.* § 306.004(c).

In Open Records Decision No. 648 (1996), this office addressed the applicability of sections 306.003 and 306.004 to information held by a state representative. In construing these provisions, we stated:

As we have seen, chapter 306 contains provisions for the disclosure of the information it covers. Thus, the chapter is not merely a confidentiality statute, but a statute that sets the parameters for public access to the information to which it applies. Accordingly, we believe chapter 306, rather than the [Act], governs the release of information within section 306.003(a) or section 306.004. *See* Open Records Decision No. 598 (1991) (statutes governing specific subset of information prevail over general applicability of [Act]). Thus, we need not consider whether information covered by chapter 306 is excepted from public disclosure pursuant to an [Act] exception Information falling within the scope of chapter 306 of the Government Code may be released only as that chapter provides and does not fall within the scope of the [Act], chapter 552 of the Government Code. A member of the legislature or the lieutenant governor may elect to disclose all or part of the information within sections 306.003(a) and 306.004 of the Government Code, but is not required to do so.

ORD 648 at 3, 7. We further found the statute’s legislative history affirmed this construction of chapter 306 of the Government Code. In a footnote, we explained the House Study Group report of the legislation that enacted the statutory predecessor to chapter 306 demonstrated “that the effect of the statute is to give legislators the discretion to release their

communications with state residents and to exempt the legislature in this regard from the ordinary disclosural requirements set forth in the [Act].” *Id.* at 3-4 n.3. Therefore, the release of information subject to section 306.004(a) is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of a legislator to either withhold or release such information.

You state Exhibit C contains information governed by section 306.004. To the extent the information in Exhibit C consists of all or part of a written or otherwise recorded communication from a citizen of this state to Senator Whitmire in his official capacity, its release is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of Senator Whitmire to either withhold or release such information. The department should confer with Senator Whitmire to determine which specific portions of the submitted information represent communications subject to section 306.004(a), as this office cannot make such a determination. To the extent the information in Exhibit C does not consist of all or part of a written or otherwise recorded communication from a citizen of this state to Senator Whitmire in his official capacity, the information is subject to the Act and we address your argument against disclosure for this information, as well as your argument against disclosure of the information in Exhibit D.

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 information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(h) This section does not apply to an investigation of child abuse or neglect in a home or facility regulated under Chapter 42, Human Resources Code.

Fam. Code § 261.201(a), (h). You contend portions of the information at issue in Exhibit C consist of names of, and statements from, clients involved in department investigations of alleged child abuse and neglect or information obtained by the department while providing services as a result of such investigations. Upon review, we find the information we have marked in Exhibit C constitutes the files, reports, records, communications, and working papers used or developed in an investigation under chapter 261 or in providing services as a result of an investigation. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). You do not indicate, and it does not otherwise appear, this is an instance where the information at issue is subject to release pursuant to section 261.201(g) or the department’s rules. *See id.* § 261.201(g) (release of certain information by department to parent, managing conservator, or other legal representative of a child who is the subject of the abuse or neglect); 40 TAC §§ 700.201-.207. As such, we determine the information we have marked is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold the marked information in Exhibit C from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.¹ However, we find you have failed to demonstrate how any of the remaining information constitutes the files, reports, records, communications, and working papers used or developed in an investigation under chapter 261 or in providing services as a result of an investigation. Furthermore, we note some of the remaining information pertains to an incident that occurred at a child care facility that is regulated by the department under chapter 42 of the Human Resources Code. Thus, in accordance with section 261.201(h), we find that section 261.201 is not applicable to that information, and the department may not withhold information pertaining to that incident under section 552.101 on that basis. *See* Fam. Code § 261.201(h). As such, none of the remaining information is confidential under section 261.201 and the department may not withhold the remaining information under section 552.101 of the Government Code on this basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 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

¹Open Records Letter No. 2003-5590 (2003) is a previous determination to the department in which this office determined that, unless the department’s rules permit the department to release requested child abuse or neglect investigation records to a particular requestor, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation are confidential under section 261.201(a) of the Family Code and excepted from disclosure under section 552.101 of the Government Code, and the department need not ask for a decision from this office again with respect to this type of information requested under the Act.

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). 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 to only 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 to only 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 D constitutes communications among department attorneys and staff that were made for the purpose of providing legal services to the department. We understand the communications were intended to be and remain confidential. Based on your representations and our review, we find the department may generally withhold the communications in Exhibit D under section 552.107(1) of the Government Code. However, we note some of the attachments contained in a submitted e-mail consist of communications with non-privileged parties. Accordingly, to the extent these communications, which we have marked, exist separate and apart from the otherwise privileged e-mail to which they are attached, then the department may not withhold the communications we have marked under section 552.107(1).

We note portions of the remaining information in Exhibit C are subject to section 552.117 of the Government Code.² 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. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the department must withhold the information we have marked. However, the department must withhold the cellular telephone numbers we have marked only if the cellular telephone service is not paid for by a governmental body. The department may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

We note the remaining information in Exhibit C contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.³

We note some of the information in Exhibit C appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, to the extent the information in Exhibit C consists of all or part of a written or otherwise recorded communication from a citizen of this state to Senator Whitmire in his official capacity, its release is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of Senator Whitmire to either withhold or release such information. To the extent Senator Whitmire determines that the information in Exhibit C is not subject to section 306.004(a) of the Government Code, the department must withhold: (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024 of the Government Code and the cellular service is not paid for by a governmental body; and (3) the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners have consented to their release. Except to the extent the non-privileged attachments we have marked exist separate and apart from the otherwise privileged e-mail, the department may withhold Exhibit D under section 552.107(1) of the Government Code. The department must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

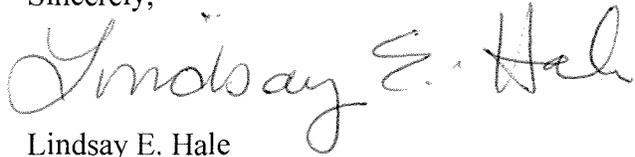
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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 cursive script that reads "Lindsay E. Hale". The signature is written in dark ink and is positioned above the typed name.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 439209

Enc. Submitted documents

c: Requestor
(w/o enclosures)