



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2012

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

OR2012-00882

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# 442850 (DFPS Tracking No. 2011-0230).

The Texas Department of Family and Protective Services (the "department") received a request for all records pertaining to two investigations involving the requestor's daughter. In addition, the requestor seeks all information from September 1, 2011 to October 25, 2011 concerning his daughter. You state that, with the exception of the reporter's identity, records pertaining to the investigation conducted by Child Protective Services were released in accordance with section 261.201(g) of the Family Code and the department's rules. *See* Fam. Code § 261.201(a), (g); 40 T.A.C. § 700.206; *see also* Open Records Letter No. 2003-5590 (2003) (granting department previous determination to withhold or release child abuse and neglect records subject to department rule without necessity of requesting opinion under Gov't Code § 552.301); *see generally* Open Records Decision No. 673 (2001) (defining types of previous determinations issued under Gov't Code § 552.301). You also state that, with the exception of the reporters' identities, records pertaining to the investigation conducted by Adult Protective Services ("APS") were released in accordance with section 48.101(d) and the department's rules. *See* Hum. Res. Code § 48.101(a), (d); 40 T.A.C. § 705.7107(1)(C). You seek to withhold the remaining information under sections 552.101 and 552.107 of the Government Code. We have considered your claimed exceptions and reviewed the submitted information.

Initially, we note the some of the submitted e-mails were created outside of the date range specified in the request. This decision does not address the public availability of the non-responsive information, and this information need not be released.

Next we note some of the records were not submitted within the fifteen-day time period required by section 552.301. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). Because the submitted case records and recordings were submitted after the fifteen-day deadline, we find the department failed to fully comply with the requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit information as required by section 552.301(e) results in the legal presumption the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302 of the Government Code); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because you assert the information you seek to withhold in these records is confidential under section 552.101, we will consider the applicability of this exception.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. Section 48.101 of the Human Resources Code provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under [the Act]:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101(a), (b), (d). Some of the submitted records were developed as part of an APS investigation conducted under chapter 48 of the Human Resources Code. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). As previously noted, with the exception of the reporters' identities, this information has been released to this requestor in accordance with section 705.7107 of the Texas Administrative Code. You seek to withhold the identities of any reporters contained in the APS records. Section 705.7117(b) provides that the department "must redact case records to remove the name, address, and any other information in the record which reveals the identity of any person as a 'reporter.'" 40 T.A.C. § 705.7117(b). Based on your representations and our review of the records, we agree the reporter's identity contained in the written APS case records as well as, the audio recordings of the reporters' voices must be withheld under section 552.101 in conjunction with section 48.101 and section 705.7117.

Finally, we address your argument for the submitted e-mails. Section 552.107(1) of the Government Code 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 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.

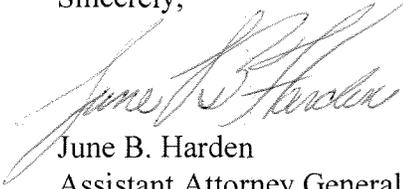
*See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney 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 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, 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 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 explain the e-mails are communications between employees and attorneys made in furtherance of providing legal services to the department. You state these communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the records, we agree most of the responsive e-mails are privileged attorney-client communications. We note, however, one of the e-mail messages in a privileged e-mail string is a communication with a party you have not shown to be privileged. Therefore, if this individual e-mail message, which we have marked, exists separate and apart from the otherwise privileged e-mail string to which it is attached, the department may not withhold this individual e-mail message under section 552.107(1). If the marked e-mail message does not exist separate and apart from the privileged e-mail string, the department may withhold it and the remaining responsive e-mails under section 552.107(1) of the Government Code.

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 cursive script, appearing to read "June B. Harden".

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/bs

Ref: ID# 442850

c: Requestor  
(w/o enclosures)