



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 2, 2012

Mr. Vic Ramirez  
Associate General Counsel  
Lower Colorado River Authority  
P.O. Box 220  
Austin, Texas 78767-0220

OR2012-04706

Dear Mr. Ramirez:

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# 449314.

The Lower Colorado River Authority (the "LCRA") received a request for certain documents and e-mails related to accidents at the Sandy Creek Energy Station and resulting delays. You claim the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.104, 552.107, 552.111, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state most of Exhibit 4 is not responsive to the request for information. We find portions of Exhibits 4 and D, which we have marked, are not responsive because they are not related to the accidents or delays specified in the request, or were created after the date the LCRA received the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the LCRA is not required to release such information in response to this request. However, we find the

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<sup>1</sup>We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

remaining information in Exhibit 4 relates to the specified accidents or delays. Accordingly, we find this information is responsive to the instant request and must be released unless an exception to disclosure applies.

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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. 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 responsive information in Exhibits 1 and 4 constitutes attorney-client communications between LCRA employees and LCRA legal counsel that were made for the purpose of facilitating the rendition of professional legal services to the LCRA. You state the information in Exhibits C, 2, 3, and 5 constitutes attorney-client communications between LCRA employees, third parties, and legal counsel for both the LCRA and these third

parties. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the LCRA and the third parties. You explain the LCRA and these third parties entered into a Common Interest and Cooperation Agreement with respect to the parties' common interests in Sandy Creek Power Plant. Thus, you explain the LCRA and the third parties share a common interest concerning the legal matters at issue in these communications. *See* TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties "concerning a matter of common interest"); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the LCRA may withhold the responsive information in Exhibits C and 1 through 5 under section 552.107(1) of the Government Code.<sup>2</sup>

We note a portion of the remaining responsive information in Exhibit D is subject to section 552.136 of the Government Code, which provides "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."<sup>3</sup> Gov't Code § 552.136(b). This office has determined an insurance policy number is an access device for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"); Open Records Decision No. 684 at 9 (2009). The LCRA must withhold the insurance policy number we have marked in Exhibit D under section 552.136 of the Government Code.

In summary, the LCRA may withhold the responsive information in Exhibits C and 1 through 5 under section 552.107(1) of the Government Code. The LCRA must withhold the insurance policy number we have marked in Exhibit D under section 552.136 of the Government Code. The LCRA must release the remaining responsive information in Exhibit D.

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).

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 "Jennifer Burnett", with a long horizontal flourish extending to the right.

Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 449314

Enc. Submitted documents

c: Requestor  
(w/o enclosures)