



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2012

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2012-08889

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 456199 (PIR 12-33137).

The Office of the Attorney General (the "OAG") received a request for information concerning a recoupment case involving the requestor. The OAG released some information and asserts the remainder is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted information. We have also received and considered comments from the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

First, the requestor's attorney asserts the OAG failed to comply with subsections 552.301(b) and (e) of the Government Code. Section 552.301(b) requires a governmental body to ask for a decision from this office and state the exceptions that apply within ten business days after it receives a written request. *Id.* § 552.301(b). The OAG states it received the request for information on March 26, 2012. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. The OAG informs us it observed a skeleton crew day for half a day on April 6, 2012 and was closed at noon; therefore, April 6

was not a business day for the purpose of calculating the Act's deadlines. Thus, the tenth business-day deadline for the instant request was April 10, 2012. Because this office received the OAG's request for a decision with asserted exceptions on April 10, 2012, the OAG's request for a ruling was timely and in compliance with section 552.301(b). Furthermore, contrary to the requestor's contention, by asserting all of the Act's exceptions, the OAG complied with section 552.301(b).

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records 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. *Id.* § 552.301(e). The requestor's attorney asserts the OAG failed to assert specific exceptions to withhold the information and explain how they apply. The OAG did assert specific exceptions, namely sections 552.107 and 552.111, and submitted its reasoning for withholding the information on April 17, 2012 in compliance with section 552.301(e). Lastly, the requestor's attorney objects to the OAG's submission of a representative sample of the requested information because the requestor does not seek voluminous or repetitive information. However, the OAG submitted the specific requested information that it seeks to withhold and not a representative sample.

Section 552.107(1) of the Government Code protects information coming 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. 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 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 OAG states the information consists of communications between and among the attorneys and staff of its Bankruptcy and Collections Division and the OAG’s client, the Department of Family and Protective Services (the “department”). Furthermore, the OAG states the communications were made for the purpose of rendering legal services to the department, were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find the OAG may withhold the information under section 552.107 of the Government Code. Because section 552.107 is dispositive, we do not address the OAG’s section 552.111 assertion for this information.

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,



Yeh-Ha Le
Assistant Attorney General
Open Records Division

YHL/bhf

Ref: ID# 456199

Enc: Submitted documents

c: Requestor
(w/o enclosures)