



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 12, 2012

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2012-09038

Dear Mr. Smith:

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# 456096.

The Texas Health and Human Services Commission (the “commission”) received a request for information from the requestor’s personnel file. You state the commission has released most of the information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information was created after the date on which the request for information was received. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990). Accordingly, this information, which we have marked, is not responsive to the request. Our ruling does not address the public availability of information that is not responsive to the request, and the commission is not required to release non-responsive information.

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

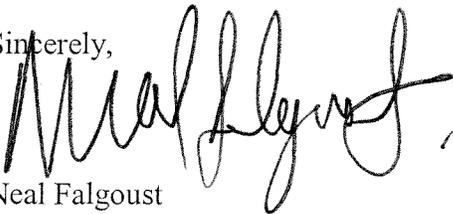
privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6–7 (2002). First, a governmental body must demonstrate that the information constitutes or documents 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 only to 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. *See* 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 only to 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, orig. proceeding). 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 submitted e-mail communications were exchanged between commission employees and an attorney for the commission in order to facilitate the rendition of legal services. You explain these e-mails were intended to be, and have remained, confidential. We note, however, one of the submitted e-mails was sent by the requestor, who is not a privileged party in this instance. Accordingly, the commission may not withhold that e-mail, which we have marked, under section 552.107(1) of the Government Code. Nonetheless, based on your representations and our review, we agree the commission may generally withhold the remaining submitted information under section 552.107(1) of the Government Code. However, we note some of the attachments to the otherwise privileged e-mails were shared with a non-privileged party, and these attachments are separately responsive to the request. Thus, to the extent these attachments, which we have marked, exist separate and apart from the otherwise privileged e-mails to which they are attached, they may not be withheld under section 552.107(1) of the Government Code 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](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 black ink, appearing to read 'Neal Falgoust', written over the word 'Sincerely,'.

Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/ag

Ref: ID# 456096

Enc. Submitted documents

c: Requestor  
(w/o enclosures)