ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2012

The Honorable Lon Burnam
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2012-09592

Dear Representative Burnam:

Pursuant to section 552.008(b-1) of the Government Code, you seek a decision from this office as to whether certain information you received from the Texas Commission on Environmental Quality ("TCEQ") pursuant to section 552.008 of the Government Code is considered confidential information for purposes of that section. Your request was assigned ID# 456817.

Initially, you inform us that on June 17, 2009, your office submitted two requests to TCEQ seeking information pertaining to an entity known as Waste Control Specialists under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. In response, TCEQ stated that several of the documents you requested were confidential and not subject to public disclosure. However, TCEQ provided those documents to you as a member of the Texas Legislature after you signed a confidentiality agreement in accordance with section 552.008(b).

Section 552.008 of the Government Code authorizes individual members, agencies, or committees of the Texas Legislature to access otherwise confidential information for official legislative purposes, but maintains the confidentiality of that information by allowing agencies to require that legislators and staff execute a confidentiality agreement. Section 552.008 provides as follows:

> (a) [The Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

> (b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:
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> > (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
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> > (2) the information be labeled as confidential;
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> > (3) the information be kept securely; or
> >
> > (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

Gov't Code § 552.008(a)-(b). Section 552.008 further provides in relevant part that,

> A member, committee, or agency of the legislature required by a governmental body to sign a confidentiality agreement under Subsection (b) may seek a decision as provided by Subsection (b-2) about whether the information covered by the confidentiality agreement is confidential under law. A confidentiality agreement signed under Subsection (b) is void to the extent that the agreement covers information that is finally determined under Subsection (b-2) to not be confidential under law.
>
> The member, committee, or agency of the legislature may seek a decision from the attorney general about the matter. The attorney general by rule shall establish procedures and deadlines for receiving information necessary to

> decide the matter and briefs from the requestor, the governmental body, and any other interested person . . . .
>
> . . .

Id. § 552.008(b-1)-(b-2). This provision of the Act allows legislative requestors to ask this office to independently confirm whether a governmental body's assertions of confidentiality meet the requisite legal standard for withholding the requested information from disclosure. In response to your request for a ruling from this office under section 552.008(b-1), TCEQ was notified of your request. *See* 1 T.A.C. § 63.3(a) (providing that the attorney general shall notify a governmental body in writing of a request for a decision made to the attorney general under section 552.008(b-1)). On May 7, 2012, TCEQ responded to that notice and submitted a letter brief to this office articulating why the agency believes the information you requested meets the legal standard for confidentiality under the Act. *See* 1 T.A.C. § 63.4(a) (setting forth the submission requirements for governmental bodies notified by the attorney general pursuant to section 63.3 of title 1 of the Texas Administrative Code). TCEQ's briefing invokes several of the Act's provisions that protect information from disclosure, including sections 552.103, 552.107, and 552.111 of the Government Code. TCEQ also cites prior open records letter rulings applying the aforementioned Government Code provisions, as well as the Rules of Evidence and the Texas Rules of Professional Conduct. We have considered both the legal arguments you raised in your request and the legal briefs submitted by TCEQ.

TCEQ informs this office that there are two documents at issue, which TCEQ submitted as Attachment I. Both documents have been the subject of requests under the Act in the past and both were previously found to be excepted from disclosure under section 552.107 of the Government Code, *see* Open Records Letter Ruling Nos. 2008-02521 (2008), 2008-3738 (2008), 2008-05094 (2008), 2009-10640 (2009).[1] Section 552.107 excepts from disclosure "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]" Gov't Code § 552.107(1). *See also* TEX. R. EVID. 503 (enacting the attorney-client privilege). TCEQ continues to assert that the attorney-client privilege protects the documents at issue and thus argues they are excepted from disclosure under section 552.107.

When a governmental body asserts the attorney-client privilege, that governmental body has the burden of providing facts necessary to prove that the information at issue satisfies the legal standard for protection under the privilege. *See* Open Records Decision No. 676 at 6-7 (2002). That standard is prescribed by the Texas Rules of Evidence. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7.

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[1]We note the information submitted as Exhibit I comprises two documents, one dated September 4, 2007 and the other dated October 25, 2007. This office ruled on the September 4, 2007 document in Open Records Letter Ruling Nos. 2008-02521 (2008), 2008-3738 (2008), and 2009-10640 (2009). The October 25, 2007 document was ruled on by this office in Open Records Letter Ruling No. 2008-05094 (2008).

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 or includes an attorney is not sufficient to meet the legal standard. The relevant attorney must be "facilitating the rendition of legal services." Third, the attorney-client 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. *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 confirm that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In response to TCEQ's claim of attorney-client privilege, you assert:

> [n]either document indicates it was prepared by an attorney, a client, or a representative of an attorney or client for the purpose of facilitating the rendition of professional legal services. Document A does not contain any information describing who produced the document, and Document B appears to have been produced by . . . an engineer. Additionally, both documents state they were produced with assistance of outside technical consultants who are not employed by the TCEQ. The documents do not appear to have been produced for the purposes of rendering legal services. It is not clear that they have not been disclosed to outside parties since their creation.

Your assertions about the nature and purpose of these documents are counter to the description of the facts contained in TCEQ's brief to this office. According to TCEQ, the documents at issue reflect communications involving TCEQ attorneys and TCEQ staff in their capacities as those attorneys' clients. TCEQ's brief details its staff attorneys' roles as

in-house legal counsel for the agency, which includes providing legal advice and counsel to the agency's Radioactive Materials Division of the Office of Permitting, Remediation and Registration. The Radioactive Materials Division is responsible for the implementation and oversight of the licensing process for radioactive waste disposal. TCEQ states that the documents at issue were distributed by a staff attorney and the Radioactive Materials Division Director to management, including the Executive Director and the Special Counsel to the Executive Director. The documents were also provided to TCEQ staff-level lawyers and supervisory attorneys, as well as their clients within the Office of Permitting, Remediation and Registration. Additionally, TCEQ's brief states:

> [t]he documents [at issue] were distributed internally within the TCEQ in preparation for face-to-face discussions between staff, upper management and their attorneys. The memoranda were intended to communicate information to TCEQ supervisors and upper management in furtherance of professional legal services and as formal advice in advance of a final decision to be made by the Executive Director. The memoranda were circulated only among the staff and attorneys of the TCEQ in their capacity as clients or attorneys of the TCEQ.

TCEQ further notes that the documents were marked "Confidential Attorney Client Communications," and states that "[n]o one outside of TCEQ received these documents, other than Representative Burnam under a settlement of a lawsuit and subject to a confidentiality agreement."

Accordingly, TCEQ's factual representations affirm that the documents at issue were: (1) distributed by a staff attorney; (2) created and distributed for the purposes of the rendering of legal services; and (3) circulated exclusively amongst TCEQ staff and attorneys so that confidentiality was at all times maintained. Accordingly, TCEQ has demonstrated that the information at issue meets the legal standards for – and is protected by – the attorney-client privilege. This determination regarding the applicability of the attorney-client privilege is consistent with rulings this office has previously issued in response to TCEQ's prior requests to withhold these documents. Having concluded that the attorney-client privilege applies, we must now determine whether the attorney-client privilege makes information confidential for purposes of a confidentiality agreement signed under section 552.008(b) of the Government Code.

In *Texas Commission on Environmental Quality v. Abbott*, 311 S.W. 3d 663 (Tex. App.—Austin 2010, pet. denied), the Third Court of Appeals construed the term "confidential information" as used in section 552.008(b). In that case, a legislator requested confidential information from TCEQ pursuant to the special right of access afforded to legislators under section 552.008. The TCEQ sought to avoid providing the information in question to the legislator. This office ruled that section 552.008 compelled TCEQ to provide the information subject to a confidentiality agreement, and TCEQ challenged our ruling in a state district court. TCEQ's lawsuit argued that the phrase "including confidential information" in subsection 552.008(b) operated to exclude documents protected by the attorney-client

privilege from legislators' special right of access under section 552.008. The district court rejected TCEQ's claim and agreed with this office's determination that TCEQ was required to produce the information subject to a confidentiality agreement. On appeal, the Third Court of Appeals ruled that "[t]he plain meaning of this phrase [confidential information] includes documents subject to the attorney-client or work-product privileges." *Id.* at 670. After dismissing TCEQ's separation of powers argument, the court concluded that section 552.008 required TCEQ to disclose the documents at issue. In so ruling, however, the court additionally stated:

> [w]e further observe that subsection 552.008(b) protects the confidentiality of [TCEQ's] documents once they are disclosed pursuant to a legislative request for information. [Citation omitted]. Subsection 552.008(b) preserves the confidentiality of [TCEQ's] documents while in the possession of Senator Shapleigh by authorizing [TCEQ] to require Senator Shapleigh to sign a confidentiality agreement prior to receiving the documents at issue . . . . These protections make clear that the legislature intended to give its members and committees a right of access even to confidential information.

Id. at 675. Thus, the Third Court of Appeals determined that information protected by the attorney-client privilege constituted confidential information for purposes of section 552.008 of the Government Code, and further, that the execution of a confidentiality agreement by a legislative requestor preserved the confidentiality of information provided to legislators under section 552.008(b).

Therefore, in accordance with the court's ruling in *Texas Commission on Environmental Quality v. Abbott*, information you were provided pursuant to a confidentiality agreement continues to be deemed confidential for purposes of section 552.008(b) of the Government Code. Thus, your office must maintain the confidentiality of the information at issue in accordance with the confidentiality agreement you executed pursuant to section 552.008(b). Should either you or TCEQ disagree with our decision in this matter, section 552.008(b-2) authorizes either party to appeal this Open Records Letter Ruling to a Travis County district court. *See* Gov't Code § 552.008(b-2).

Sincerely,

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Open Records Division

MAP/sdk

Ref: ID# 456817

Enc. Submitted documents

c: Mr. Robert Martinez
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