



ATTORNEY GENERAL OF TEXAS
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October 18, 2012

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Mr. Stanton Strickland
Associate Commissioner
Legal Section
Texas Department of Insurance
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OR2012-16665

Dear Mr. Lealos and Mr. Strickland:

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# 469323 (TDI# 130627).

The Texas Department of Insurance (the "department") received a request for (1) [any] documents that mention or refer to twenty-one named individuals during a specified time period; and (2) calendars that mention or refer to a different named individual during the same specified time period. You state the department is releasing some information. You also inform us the department is redacting the e-mail addresses of members of the public in the submitted information under section 552.137 of the Government Code pursuant to the previous determination in Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

the Government Code. You do not take a position as to whether the remaining submitted information is excepted from disclosure under the Act. However, you state, and provide documentation showing, you notified the following third parties of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: United Health Care Insurance Company ("United"); Texas Association of Health Plans ("TAHP"); Celtic Insurance Company; Texas Hospital Association; CIGNA; and Golden Rule Insurance. See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from attorneys for United and TAHP.² We have also received comments from the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of submitted information, which we have marked, is not responsive because it does not refer to any of the named individuals in the request. The department need not release this nonresponsive information and this ruling will not address that information.³

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. See *id.* § 552.305(d)(2)(B). As of the date of this letter, only United has submitted to this office reasons explaining why the submitted information should not be released. We thus have no basis for concluding any portion of the information at issue constitutes proprietary information of any of the remaining interested third parties, and the department may not withhold any portion of the information on that basis. See Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

The department asserts some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code, which 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).

²In correspondence to our office, the attorney for TAHP states she does not object to release of the submitted information.

³As our ruling is dispositive for this information, we need not address United's arguments against its disclosure.

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. 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, and lawyer representatives. 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). 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 information you have marked under section 552.107(1) constitutes confidential communications between attorneys and employees of the department that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree this information constitutes privileged attorney-client communications that the department may withhold under section 552.107(1) of the Government Code.⁴

In summary, the department may withhold the information you have marked under section 552.107 of the Government Code. The department must release the remaining responsive information.

⁴As our ruling is dispositive, we do not address your other argument to withhold 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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 469323

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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