



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2012

Ms. Margo Kaiser
Staff Attorney
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2012-18606

Dear Ms. Kaiser:

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# 472026 (TWC Tracking Nos. 120911-004 and 120911-005).

The Texas Workforce Commission (the "commission") received two requests from the same requestor for personnel records involving the requestor.¹ You indicate some of the requested information either has been or will be released. You state the commission will withhold some of the requested information pursuant to section 301.085(c) of the Labor Code and Open Records Decision No. 684 (2009).² You claim other responsive information is excepted from disclosure under section 552.107 of the Government Code.³ We have

¹We note the present requests are modifications of previous requests the commission received from this requestor, in response to which the commission submitted cost estimates and requests for costs deposits to the requestor. *See* Gov't Code § 552.263(e-1).

²Section 301.085(c) of the Labor Code provides that "[u]nemployment compensation information and job matching services information are not public information for purposes of [the Act]." Labor Code § 301.085(c). Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold specified categories of information without the necessity of requesting a decision under the Act. *See* ORD 684 at 14-15; *see also* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations).

³Although you also claim the attorney-client privilege under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

considered the exception you claim and reviewed the representative sample of information you submitted.⁴ We also have considered the comments we received from the requestor.⁵

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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. *See 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).

You state the submitted information consists of communications between attorneys for and client representatives of the commission that were made in connection with the rendition of

⁴This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

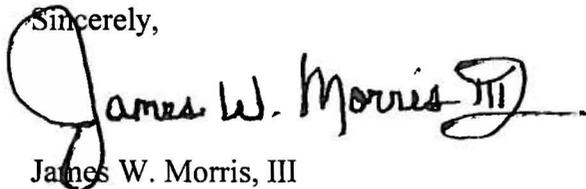
⁵*See* Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

professional legal services to the commission. You have identified the attorneys involved in the communications. You state the communications were intended to be and remain confidential. Based on your representations and our review, we conclude the commission may withhold most of the submitted information under section 552.107(1) of the Government Code. We note, however, that one of the submitted e-mail strings and another submitted document are communications between the commission and non-privileged parties. We conclude that information, which we have marked, may not be withheld under section 552.107(1) and must be released, except for any information the commission is authorized to withhold pursuant to section 301.085(c) of the Labor Code and Open Records Decision No. 684.⁶ We also note two other e-mail strings that are otherwise protected by section 552.107(1) include communications with non-privileged parties. If the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the present requests for information. Therefore, to the extent those e-mails, which we have marked, are maintained by the commission separate and apart from the related e-mail strings, they may not be withheld under section 552.107(1) and must be released, except for any information the commission is authorized to withhold pursuant to section 301.085(c) and Open Records Decision No. 684.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

⁶We note the marked information includes e-mail addresses of members of the public. Open Records Decision No. 684 authorizes all governmental bodies to withhold an e-mail address of a member of the public under section 552.137 of the Government Code without requesting a decision under the Act.

Ref: ID# 472026

Enc: Submitted documents

c: Requestor
(w/o enclosures)