



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2013

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2013-02725

Dear Ms. Alexander:

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# 479111.

The Texas Department of Transportation (the "department") received a request for all e-mail correspondence between the requestor, five named individuals, and employees of two specified departments during a specified time period. You indicate the department will release some of the requested information to the requestor upon his response to a cost estimate letter. You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raise Texas Rule of Evidence 503, we note section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to required disclosure under section 552.022 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 (2002).

²We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

Initially, you state some information responsive to the request is not maintained by the department. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You indicate some of the information at issue has been deleted from the department's computers, and you state the information at issue is stored offsite on backup tapes.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state the department does not maintain the information at issue because it is stored offsite on backup tapes. We understand you to claim the information is not maintained on hard drives of the department's computers or on the department's servers. You state the department does not have a way to search the backup tapes electronically for responsive information or to separate out the responsive information. Based on your representations, we determine the locations of the files have been deleted from the FAT system. Accordingly, we find that the deleted information was no longer being "maintained" by the department at the time of the request, and is not public information subject to disclosure under the Act. *Bustamante* at 266; *see also* Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude in this instance, the Act does not require the department to recover and release any information that was stored only remotely on the department's backup tapes on the date the present request was received.

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. ORD 676 at 6-7. 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 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). Therefore, 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 state Exhibits B and C consist of e-mails sent to, from, and among department attorneys, department employees, and the department’s outside legal counsel. You also note some of the information at issue includes correspondence with an outside party, KPMG, a department contractor with whom the department shares a common interest. *See* TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state the communications at issue were made in furtherance of the rendition of legal services to the department, and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the department may withhold Exhibits B and C under section 552.107(1) of the Government Code.³

³As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the department must withhold the bank account numbers you have marked in Exhibit D under section 552.136 of the Government Code.

We note the remaining information in Exhibit D contains e-mail addresses subject to section 552.137 of the Government Code.⁴ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses we have marked in Exhibit D under section 552.137 of the Government Code, unless the owners affirmatively consents to their public disclosure.⁵

In summary, the department is not required to recover and release any information that was stored only remotely on the department’s backup tapes on the date the present request was received. The department may withhold Exhibits B and C under section 552.107(1) of the Government Code. The department must withhold the bank account numbers you have marked in Exhibit D under section 552.136 of the Government Code. Unless the owners consent to release, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code in Exhibit D. The department must release the remaining 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

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten 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.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 479111

Enc. Submitted documents

c: Requestor
(w/o enclosures)