



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2013

Mr. Quentin Russell
Assistant District Attorney
Walker County
P.O. Box 1659
Huntsville, Texas 77340

OR2013-00811

Dear Mr. Russell:

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# 476239.

The Walker County Criminal District Attorney's Office (the "district attorney's office") received a request for all incoming and outgoing e-mails concerning a specified open records request. You claim some of 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. We have also received and considered comments submitted to this office by the requestor. See Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Section 552.107 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 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). 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 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 the information you have marked consists of confidential communications between an attorney with the district attorney’s office and employees of Walker County in their capacity as clients for the purpose of furthering the rendition of professional legal services. You have identified the parties to the communications and state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find the district attorney’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district attorney’s office may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government

Code.¹ See Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). We note section 552.117(a)(1) encompasses an employee's personal cellular telephone number as long as the cellular service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1998) (Gov't Code § 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the cellular telephone number of a Walker County employee. If the employee whose information is at issue timely elected to keep her information confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district attorney's office may not withhold this information under section 552.117(a)(1) if the employee did not timely elect to keep her information confidential pursuant to section 552.024 or if the cellular services is paid for by a governmental body.

In summary, the district attorney's office may withhold the information you have marked under section 552.107(1) of the Government Code. The district attorney's office must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the employee whose information is at issue timely elected to keep her information confidential and the cellular service is not paid for by a governmental body. The remaining information must be released.²

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

¹The 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).

²We note the information being released contains the requestor's e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. See Gov't Code § 552.137(b). Should the district attorney's office receive another request for this information from a different requestor, we 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. See ORD 684.

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, appearing to read "Kristi L. Wilkins". The signature is written in a cursive style with a large initial "K".

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 476239

Enc. Submitted documents

c: Requestor
(w/o enclosures)