



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2014

Ms. Jordan Hale
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2014-03913

Dear Ms. Hale:

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# 515775 (PIR No. 13-37792).

The Office of the Attorney General (the "OAG") received a request for communications with several named individuals, including but not limited to, communications concerning seven specified cases. The requestor seeks communications dated July 13, 2013, or thereafter. The OAG states it does not maintain records responsive to the request for communications concerning the cases numbered one through three and five through seven.¹ The OAG states it will release information responsive to the request for communications concerning the fourth case on the requestor's list of cases. The OAG claims the submitted information is excepted from disclosure under section 552.107(1) of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

information.² We have also received and considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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. 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. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). 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).

The OAG states the submitted information consists of communications between and among OAG attorneys and attorneys representing parties to which the OAG is similarly aligned. The OAG explains the communications were created “for the purpose of discussing and coordinating various aspects of federal cases involving Luminant Generation Company (“Luminant”) and the State of Texas versus the United States Environmental Protection Agency.” The OAG states “the OAG and these parties are considered joint petitioners or respondents for purposes of the case at issue.” The OAG explains the parties “share a common litigation interest in the matters at issue with the OAG.” The OAG states the information at issue constitutes or reveals communications between privileged parties that

²We assume the representative sample of records 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 that submitted to this office.

were made for the purpose of providing professional legal services to the OAG and the State of Texas. Furthermore, the OAG states the communications were intended to be confidential, and the confidentiality of the communications has been maintained.

After review of the submitted information and consideration of your arguments, we conclude the OAG may withhold the submitted information under section 552.107(1) of the Government Code. *See* TEX. R. EVID. 503(b)(1)(C); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012) (discussing allied litigant doctrine of Rule 503(b)(1)(C)).

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KHG/akg

Ref: ID# 515775

Enc. Submitted documents

c: Requestor
(w/o enclosures)