



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 9, 2015

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

OR2015-04415

Dear Ms. Downey:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 557042 (PIR# 14-40526). Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (the "OAG") received a public information request for "[a]ll emails to or from Greg Abbott, Daniel Hodge, Reed Clay or any deputy attorney general in November and December 2014 to Rick Perry, Kathy Walt, Mike Morissey, MacGregor Stephenson, Teresa Spears, Mark Minor, Mary Anne Wiley, Kate McGrath or Kyle Janek that include the word 'contract'" and for "[a]ll emails to or from any employee of the Texas Attorney General's Office in 2014, 2013 or 12 that include '21CT' or '21 CT.'" You claim the requested information submitted in Exhibit B and C is excepted from disclosure under Government Code sections 552.107 and 552.108, respectively. We have considered the exceptions you claim and reviewed the information you have submitted in the exhibits.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* TEX. GOV'T CODE ANN. § 552.107(1) (West 2012). 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 Tex. Att’y Gen. ORD-676 (2002) 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. See *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), mand. denied, 12 S.W.3d 807 (Tex. 2000) (stating that the attorney-client “privilege does not apply if the attorney is acting in a capacity other than that of an 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, lawyer representatives, and a lawyer “representing another party in a pending action and concerning a matter of common interest therein.” 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, *see 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, orig. proceeding [mand. denied]) (stating that “the issue of confidentiality focuses on the intent of the parties at the time the communications are made”). 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) (orig. proceeding) (recognizing that the privilege extends to “entire communication, including facts contained therein”).

You state that the submitted representative samples¹ of information in Exhibit B include information that you have marked as involving confidential communications between OAG attorneys and OAG personnel made for the purpose of providing professional legal services to the OAG. You state that the remaining information constitutes samples of

¹ We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Tex. Att’y Gen. ORD-499 (1988) at 6, ORD-497 (1988) at 4. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

communications between OAG attorneys and their client agency, the Texas Health and Human Services Commission. You tell us that these communications in Exhibit B consist of communications between privileged parties that were made for the purpose of providing professional legal services to the OAG and the Texas Health and Human Services Commission. You further state that these communications were not intended to be disclosed and that they have not been disclosed to non-privileged parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, you may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of a crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of a crime.” TEX. GOV’T CODE ANN. § 552.108(a)(1) (West 2012). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A). Section 552.108 may be invoked by any proper custodian of information relating to an investigation or prosecution of criminal conduct. Tex. Att’y Gen. ORD-474 (1987) at 4-5, ORD-372 (1983) at 4. Where a governmental body has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a different law enforcement agency, the custodian may withhold the information if it provides this office with “(1) a demonstration that the information relates to the pending case, and (2) a representation from the entity with the law enforcement interest stating that entity wishes to withhold the information.” Tex. Att’y Gen. OR-2012-00360, at 2. You state that the Travis County District Attorney’s Office has notified the OAG that the information in Exhibit C pertains to a pending criminal case and that release of the information in Exhibit C would interfere with the pending case. *See Houston Chronical Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), writ ref’d n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). Based on these representations and our review, we agree that section 552.108(a)(1) is applicable to the information at issue. Accordingly, you may withhold the information in Exhibit C under section 552.108(a)(1) of the Government Code.

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,

A handwritten signature in cursive script that reads "Charlotte M Harper".

Charlotte M. Harper
Assistant Attorney General
Opinion Committee

CMH/sdk

Ref: ID# 557042

Enc. Submitted documents

c: Requestor
(w/o enclosures)