



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 9, 2015

Ms. June Harden  
Assistant Attorney General  
Public Information Coordinator's Office  
General Counsel Division  
Office of the Attorney General  
Post Office Box 12548  
Austin, Texas 78711-2548

OR2015-04416

Dear Ms. Harden:

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 ("ORD") of this office and assigned ID# 560068 (PIR# 15-40757). Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (the "OAG") received a public information act request from Ms. Audrey S. Efseroff for documents related to requests 501159 and 548559. You indicate that the OAG has released some of the requested information. You state that the remainder of the responsive information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the information you have submitted as Exhibit B.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. TEX. GOV'T CODE ANN. § 552.107(1). 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. 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) (attorney-client privilege does not apply if attorney is 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. 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, orig. proceeding [mand. denied]). 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) (privilege extends to “entire communication, including facts contained therein”).

You state that the documents within Exhibit B consist of internal ORD tracking sheets and e-mails between ORD attorneys. You further state that a tracking sheet is “used in the process of drafting, reviewing, editing, and revising draft letter rulings before their issuance in final form,” and is “used by ORD attorneys to communicate their legal advice and opinions.” You also state that all of the communications provided under Exhibit B “were not intended to be disclosed and have not been disclosed to non-privileged parties.” Based on your representations and our review, we conclude that the information you have provided under Exhibit B is subject to the attorney-client privilege and may be withheld under section 552.107(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](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,



Virginia K. Hoelscher  
Assistant Attorney General  
Opinion Committee

VKH/sdk

Ref: ID# 560068

Enc. Submitted documents

c: Requestor  
(w/o enclosures)