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ATTORNEY GENERAL OF TEXAS

March 24, 2015

Mr. Jonathan Miles
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030, Agency Mail Code E 611
Austin, Texas 78714-9030

OR2015-05615

Dear Mr. Miles:

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# 557193 (DFPS Ref. No. 12232014KXX).

The Texas Department of Family and Protective Services (the "department") received a request for all e-mails, text messages, or other electronic communications to or from a named individual that mentions "21CT" or "21 CT" during a specified period of time. The department states it will release some of the requested information. The department states it will redact information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code, e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009), and information pursuant to the previous determination issued to the department in Open Records Letter No. 2003-05590 (2003).¹ The department claims the

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684. Open Records Letter No. 2003-05590 is a previous determination authorizing the department to withhold, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, the records concerning an investigation of

submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception the department claims and reviewed the submitted representative sample of information.²

We note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-04749 (2015). In Open Records Letter No. 2015-04749, we determined the department may not withhold the information at issue under section 552.107 of the Government Code; however, in releasing the information at issue, the department must withhold some of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy. The department again raises section 552.107 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law).* Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although the department raises section 552.107, this section does not prohibit the release of information or make information confidential. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Thus, to the extent any of the requested information was previously released in accordance with Open Records Letter No. 2015-04749, the department may not now withhold such information under section 552.107. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the department must continue to rely on Open Records Letter No. 2015-04749 as a previous determination and withhold or release the identical information in accordance with that ruling. *See Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).* We will address the department's arguments against release of the information not encompassed by Open Records Letter No. 2015-04749.

an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation, unless the department's rules permit the department to release requested records to a particular requestor.

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.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 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. *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, 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. Finally, the attorney-client privilege applies only to a confidential communication, 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). 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The department states the submitted information consists of communications involving department attorneys, employees, and officials. The department states the communications were made for the purpose of facilitating the rendition of professional legal services to the department and these communications have remained confidential. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to the submitted information. Thus, the department may withhold the submitted information under section 552.107(1) of the Government Code.

In summary, the department must continue to rely on Open Records Letter No. 2015-04749 as a previous determination and withhold or release the identical information in accordance

with that ruling. The department may withhold the submitted information that is not encompassed by the previous determination 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, 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 557193

Enc. Submitted documents

c: Requestor
(w/o enclosures)