



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 20, 2015

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

OR2015-09840

Dear Ms. Harden:

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# 565165 (OAG PIR No. 14-40539).

The Office of the Attorney General (the "OAG") received a request for the following information: 1) visitor logs for two specified buildings during a specified time period and 2) calendars and schedules for the attorney general and any assistants working on issues relating to the Deepwater Horizon oil spill and cases in which contract or outside counsel were used.¹ You state the OAG does not possess some of the requested information.² You

¹You state the OAG sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Additionally, you inform us the requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code, which the OAG received on March 10, 2015. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See* *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

state the OAG has released some of the requested information. You further state the OAG will redact some of the information pursuant to sections 552.024,³ 552.130(c),⁴ 552.136(b),⁵ and Open Records Decision No. 684 (2009).⁶ Additionally, you state the OAG will redact calendar entries that are not subject to the Act. *See* Gov't Code § 552.002(a) (defining "public information"); *see also id.* §552.002(a-1); Open Records Decision No. 635 at 7 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁷

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information you have marked satisfies the standard articulated by the Texas Supreme Court

³Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 of the Government Code without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.024(c), .117.

⁴Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

⁵Section 552.136 authorizes a governmental body to redact the information described in section 552.136(b) without the necessity of seeking an attorney general decision. *See* Gov't Code § 552.136(b). If a governmental body redact such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

⁶Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision.

⁷This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

in *Industrial Foundation*. Accordingly, the OAG must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming 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. 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 "to facilitate 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. *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 a 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. 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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).

You state the information you have marked under section 552.107(1) of the Government Code documents internal communications between attorneys and staff of OAG divisions, as well as communications between the OAG and its client agencies. You further state some of the information documents communications between attorneys and staff of the OAG and co-defendants, co-plaintiffs, and other parties with whom the OAG shares a common legal interest. *See In re XL Speciality Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). You state these communications were

made for the purpose of providing legal services to the OAG or its client agencies regarding matters within the scope of the OAG's purview. You further state these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Based on these representations and our review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the marked information. Accordingly, the OAG may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You state the information you have marked under section 552.107(2) of the Government Code reveals settlement negotiations between the State of Texas and BP Exploration and Production, Inc. ("BP") pertaining to the 2010 Deepwater Horizon oil spill. You state the OAG filed suit against BP for damages sustained by the state as a result of the explosion of the Deepwater Horizon oil rig. You further state the OAG is representing the State of Texas and other client agencies in this suit. You inform this office the United States District Court for the Eastern District of Louisiana has issued an order prohibiting the disclosure of certain settlement communications related to this matter. You have submitted a copy of the Order Relating to Confidentiality of Settlement Communications (the "order"), which provides "[e]xcept as otherwise provided in this Order, a party receiving Settlement Communications under this Order shall keep them confidential and not disclose them to persons or entities not a party to the negotiations for which the Settlement Communications are being exchanged." *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, Case No. 2:10-md-02179-CJB-SS (E.D. La. filed July 8, 2011) (order relating to confidentiality of settlement communications). The order defines "settlement communications" to mean "(a) oral or written communications that occurred between April 20, 2010 and the date of this order relating to the settlement of the Subject Claims; (b) oral settlement discussions between any Parties concerning any Subject Claims that take place after the date of this Order; and (c) materials in written or electronic form that are: (i) prepared for purposes of settlement negotiations with respect to any Subject Claims, (ii) exchanged by and between the negotiating parties in settlement negotiations with respect to any Subject Claims after the date of this order, and (iii) labeled in accordance with Paragraph 5." *Id.* Paragraph 5 of the order provides that "[a]ll written or electronic materials created after the date of this Order that a Party wishes to have treated as Settlement Communications under this Order shall be conspicuously labeled [*]Settlement Communication[*] at the time of the exchange." *Id.* We understand the order applies to the OAG and remains in effect. You explain the information you have marked under section 552.107(2) reveals settlement communications subject to the order. Thus, we conclude the OAG must withhold the information you have marked pursuant to section 552.107(2) of the Government Code.

In summary, the OAG must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The OAG may withhold the information you have marked under section 552.107(1) of the

Government Code. The OAG must withhold the information you have marked under section 552.107(2) of the Government Code. The OAG must release the remaining information.

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,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 565165

Enc. Submitted documents

c: Requestor
(w/o enclosures)