



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 8, 2015

Ms. Lisa Calem-Lindström
Public Information Coordinator
Texas Facilities Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR2015-13829

Dear Ms. Calem-Lindstrom:

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# 570738.

The Texas Facilities Commission (the "commission") received a request for certain communications involving three commission employees during specified time periods, excluding personal communications.¹ You claim some of the submitted information is not subject to the Act. You claim the remaining information is excepted from disclosure under sections 552.106, 552.107, 552.111, and 552.116 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor specifically excludes personal communications from his request, and the commission states the information in Exhibit A consists of personal

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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).

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.

communications. Thus, Exhibit A is not responsive to the present request for information.³ This ruling does not address the public availability of non-responsive information, and the commission need not release non-responsive information in response to the request.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov’t Code § 552.116. The commission states the information in Exhibit B consists of audit working papers prepared or maintained by the commission’s Office of Internal Audit related to a specific human resources audit. The commission informs us this audit was authorized by section 2102.007(a)(6) of the Government Code. *See id.* § 2102.007(a)(6). Upon review, we agree Exhibit B consists of audit working papers for purposes of section 552.116.

³As we are able to make this determination, we do not address your assertion that this information is not subject to the Act.

Therefore, the commission may withhold Exhibit B under section 552.116 of the Government Code.⁴

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 “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).

The commission states the information in Exhibit C consists of communications involving commission attorneys, representatives, and other commission employees and officials. The commission also explains some of the communications at issue are between commission attorneys and privileged parties. The commission states the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Upon review, we find

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

the commission has demonstrated the applicability of the attorney-client privilege to the information in Exhibit C. Thus, the commission generally may withhold Exhibit C under section 552.107(1) of the Government Code.⁵

However, we note two of the e-mail strings in Exhibit C contain an e-mail and an attachment received from or sent to non-privileged parties. Furthermore, if the e-mail and attachment are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the commission maintains the non-privileged e-mail and attachment, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mail and attachment under section 552.107(1) of the Government Code.

In summary, the commission may withhold Exhibit B under section 552.116 of the Government Code. The commission generally may withhold Exhibit C under section 552.107(1) of the Government Code. However, if the commission maintains the non-privileged e-mail and attachment we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mail and attachment under section 552.107(1) of the Government Code. The commission must release any remaining responsive 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Ref: ID# 570738

Enc. Submitted documents

c: Requestor
(w/o enclosures)