



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 15, 2015

Mr. Brad Levenson  
Director  
Texas Office of Capital Writs  
1700 North Congress Avenue, Suite 460  
Austin, Texas 78711

OR2015-14393

Dear Mr. Levenson:

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# 571976.

The Texas Office of Capital Writs (the "office") received a request for (1) the office's employee turnover rate, (2) a specified complaint, all communications relating to the complaint, and the status of the complaint, (3) a specified lawsuit, all documents or communications related to the lawsuit, the status of the lawsuit, and, to the extent the lawsuit has been settled, the amount for which it settled and the source of the settlement funds, and (4) the status of the office's director's appointment. You state the office has released some responsive information with information subject to section 552.117 of the Government Code redacted pursuant to section 552.024 of the Government Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of

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<sup>1</sup>Section 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).

the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, you state, and we agree, Exhibit F is not responsive to the instant request for information because it does not fall within any of the four categories of information specified in the request. This ruling does not address the public availability of any information that is not responsive to the request and the office is not required to release such information in response to this request.

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. *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 "to facilitate 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, and lawyer representatives. *See* 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. Finally, 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

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (2002). Furthermore, although you assert the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* generally ORD 676.

<sup>3</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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. *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 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 Exhibits C and D consist of communications between employees and officials of the office and attorneys in the Texas Attorney General’s Office, who represented the office in the matter at issue in the request. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the office and these communications have remained confidential. Upon review, we find the office has demonstrated the applicability of the attorney-client privilege to Exhibits C and D. Thus, the office may generally withhold Exhibits C and D under section 552.107(1) of the Government Code. However, we note one of these e-mail strings includes an e-mail received from or sent to a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the office maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the office may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. To the extent the e-mail at issue exists separate and apart, we will consider whether it is otherwise excepted from disclosure under the Act.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).<sup>4</sup> *See Gov’t Code* § 552.137(a)-(c). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

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. This exception encompasses information made confidential by other

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos.* 481 (1987), 480 (1987), 470 (1987).

statutes, such as Section 154.073 of the Civil Practice and Remedies Code, which provides, in relevant part:

(a) Except as provided by [s]ubsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). You state Exhibit E consists of a communication made between the opposing party in an alternative dispute resolution procedure, the office, and a mediator. Based on your representations and our review of the information, we agree the information at issue consists of a communication relating to the subject matter of a dispute made by a participant in an alternative dispute resolution procedure. Therefore, the office must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

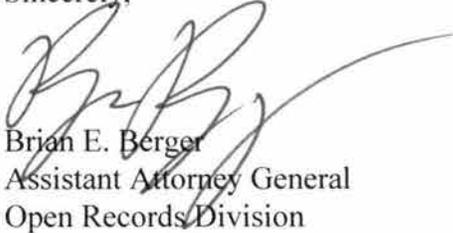
In summary, the office may generally withhold Exhibits C and D under section 552.107(1) of the Government Code. However, if the office maintains the non-privileged e-mail we have marked separate and apart from the otherwise privileged e-mail string in which it appears, then the office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure, and release the remaining information at issue. The office must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies 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,



Brian E. Berger  
Assistant Attorney General  
Open Records Division

BB/bhf

Ref: ID# 571976

Enc. Submitted documents

c: Requestor  
(w/o enclosures)