



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 16, 2015

Ms. Jessica Escobar  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR2015-19366

Dear Ms. Escobar:

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# 579680 (TDA-PIR-15-810).

The Texas Department of Agriculture (the "department") received a request for all e-mails sent or received by a named official, all exchanges between the department and federal officials concerning the department's repeal of prohibitions that restricted the use of fryers and the sale of low-calorie beverages in Texas schools, and all department-wide e-mails or memoranda mentioning a named individual. The department states it has released some of the requested information. The department claims some of the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code.<sup>1</sup> We have considered the exceptions the department claims and reviewed the submitted information.

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<sup>1</sup>Although the department raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. Further, although the department claims Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although the department raises section 552.103 of the Government Code, it makes no arguments to support this exception. Therefore, we assume the department has withdrawn its claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

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. ORD 676 at 6-7. 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 department states the information in Exhibit C and the information it has marked in Exhibit E consists of communications involving department attorneys and other department 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 information in Exhibit C and the information it has marked in Exhibit E. Thus, the department may withhold the information in Exhibit C and the information it has marked in Exhibit E under

section 552.107(1) of the Government Code.<sup>2</sup> As no other exceptions are raised for the remaining information, the department must release it.

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,



David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/bhf

Ref: ID# 579680

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As our ruling is dispositive, we need not address the department's remaining argument against disclosure.