



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 16, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-19386

Dear Ms. Parker:

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# 579422.

The Texas Department of Transportation (the "department") received a request for all information pertaining to a sand pit at a specified address. The department states it will release some information. The department claims the 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.¹

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

¹We 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.

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 submitted information consists of confidential communications involving a department attorney and department employees in their capacities as clients. The department states these communications were made in furtherance of the rendition of professional legal services to the department. The department states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may generally withhold the submitted information under section 552.107(1) of the Government Code.

We note, however, some of the e-mail strings include e-mails received from a party with whom the department has not demonstrated it shares a privileged relationship. Furthermore, if the e-mails received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Next, we address section 552.137 of the Government Code to the extent the marked e-mails exist separate and apart from the otherwise privileged e-mail strings. Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of

communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).² Gov’t Code § 552.137(a)–(c). Accordingly, to the extent the marked e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the department may withhold the submitted information under section 552.107(1) of the Government Code; however, if the non-privileged e-mails, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the marked e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

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,



Rahat Huq
Assistant Attorney General
Open Records Division

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²The 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).

Ref: ID# 579422

Enc. Submitted documents

c: Requestor
(w/o enclosures)