KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 23, 2015

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

OR2015-22332

Dear Ms. Downey:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was originally received by the Open Records Division ("ORD") of this office and assigned ID# 588928 (Attorney General PIR No. 15-42370). Because ORD possessed documents responsive to the requests, preparation of this ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (the "OAG") received a Public Information Act request from Mr. Frank Wyman. You indicate that the OAG has released some of the requested information. You state that other responsive information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted as Exhibit B.[1]

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. TEX. GOV'T CODE ANN. § 552.107(1) (West 2012). When

[1]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Tex. Att'y Gen. ORD-499 (1988) at 6, Tex. Att'y Gen. ORD-497 (1988) at 4. 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.

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. Tex. Att'y Gen. ORD-676 (2002) at 6-7. First, a governmental body must demonstrate "the information constitutes or documents a communication." *Id.* at 7. Second, the communication must have been made for the purpose of facilitating "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. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), mand. denied, 12 S.W.3d 807 (Tex. 2000) (attorney-client privilege does not apply if attorney is 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). 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., meaning it was "not intended to be disclosed to third persons other than those . . . to whom disclosure is made to further the rendition of professional legal services to the client [or those] 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 [mand. denied]). 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) (orig. proceeding) (privilege extends to "entire communication, including facts contained therein").

You state that the documents within Exhibit B consist or reveal communications between and among OAG attorneys and personnel, including notes, internal ORD tracking sheets, and draft letters. You further state that the tracking sheets are "used by ORD attorneys to communicate their legal advice and opinions" and are "part of the communications used in the process of taking a file through the complaint and enforcement process." You also state that "[n]one of the communications in Exhibit B were intended to be disclosed and none have been disclosed to non-privileged parties." Based on your representations and our review, we conclude that the information you have provided under Exhibit B is subject to the

attorney-client privilege and may be withheld under section 552.107(1) of the Government 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, 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,

Virginia K. Hoelscher

Virginia K. Hoelscher
Assistant Attorney General
Opinion Committee

VKH/sdk

Ref: ID# 588928

Enc. Submitted documents

c: Requestor
(w/o enclosures)