



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 4, 2016

Ms. Lori J. Kaspar
County Attorney
Hood County
1200 West Pearl Street
Granbury, Texas 76048

OR2016-02759

Dear Ms. Kaspar:

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# 596854.

The Hood County Clerk's Office (the "county clerk's office") received a request for all communications between the Hood County Clerk (the "county clerk") or her staff and forty-three named individuals or organizations. We understand the county clerk's office takes no position as to whether the submitted information is excepted from disclosure under the Act. We have received comments from legal counsel for the county clerk claiming section 552.107 and 552.111 of the Government Code for the submitted information.¹ *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). Additionally, we have received comments from the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information.

¹Although counsel for the county clerk also raises section 552.101 of the Government Code in conjunction with Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and Texas Rule of Evidence 503, 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 (1990). Furthermore, we note section 552.107 of the Government Code is the proper exception to claim for attorney-client privileged information not subject to section 552.022 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 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. 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 counsel for the county clerk states the submitted information consists of communications between the county clerk and outside counsel for the county clerk. Additionally, the counsel for the county clerk states these communications were made for the purpose of facilitating the rendition of professional legal services to the county clerk, the confidentiality of the communications has been maintained, and the communications were not intended to be shared with any third parties. Based on these representations and our review, we find the applicability of the attorney-client privilege to the information at issue has been

demonstrated. Thus, the county clerk's office may withhold the submitted information under section 552.107(1) of the Government Code.²

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 596854

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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²As our ruling is dispositive, we need not address the remaining arguments against disclosure.