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ATTORNEY GENERAL OF TEXAS

March 22, 2016

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

OR2016-06504

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. This request was originally received by the Open Records Division (the "ORD") of this office and assigned ID# 603877 (Attorney General PIR No. 16-43239). Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General ("OAG") received two requests for information from the same requestor for documents associated with file ID# 599560 and PIR Nos. 16-43239 and 16-43304. You state that the OAG has released some of the information responsive to this request. You assert that the remaining responsive information is excepted from public disclosure under section 552.107(1) of the Government Code. We have considered the exception you claim and reviewed the representative samples of information you submitted under the tabs marked "Exhibit B."¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.107(1) of the Government Code protects information that comes 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. Tex. Att’y Gen. ORD-676 (2002) 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. *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 satisfy 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. TEX. R. EVID. 503(b)(1)(A)–(E). 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 . . . 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. *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 representative samples of information within the tabs marked “Exhibit B” consist of internal ORD tracking sheets “used in the process of taking a file through the complaint and enforcement process.” You state that the “tracking sheets are circulated with the complaint and enforcement files and are used by ORD attorneys to communicate their legal advice and opinions.” You assert that the communications at issue are between privileged parties and “were made for the purpose of providing professional legal services to the OAG.” You also state that these communications were not intended to be disclosed and have not been disclosed to non-privileged parties.

Based on your representations and our review, we find that the information submitted in the tabs marked "Exhibit B" constitutes attorney-client communications made in furtherance of the rendition of legal services to the OAG. Therefore, we conclude that the OAG may withhold the documents in their entirety 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,



Becky P. Casares
Assistant Attorney General
Opinion Committee

BPC/sdk

Ref: ID# 603877

Enc. Submitted documents

c: Requestor
(w/o enclosures)