



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 6, 2016

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

OR2016-10368

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# 611955.

The Texas Department of Transportation (the "department") received a request for (1) e-mails related to the hiring of named temporary employees between named individuals during a specified time frame; (2) documents approving the hiring of temporary employees by named employees; (3) copies of specified interview transcripts regarding the requestor's termination; (4) all documents related to the requestor's termination; (5) all documents from a specified investigation involving the requestor; (6) specified documents regarding the hiring and firing of named temporary employees, including time sheets and payroll hours; and (7) all requests for temporary personnel approved by named individuals. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that 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 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 coming within the attorney-client privilege. *See* Gov't Code § 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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) (attorney-client privilege does not apply if attorney 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, and lawyer representatives. *See* 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. Finally, 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. *See 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 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).

You state the information you have marked consists of communications involving department attorneys and employees. You state 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 you have demonstrated the applicability of the attorney-client privilege to this information. Thus, the department may withhold the information you have marked under section 552.107(1) of the Government Code.²

²As our ruling is dispositive, we do not address your other argument to withhold this information.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the remaining information consists of audit working papers prepared by the department's internal auditors during a formal investigation audit into specified acts and allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance. You inform us the audits are authorized by chapters 321 and 2102 of the Government Code. *See* Transp. Code § 201.108 (Texas Transportation Commission shall appoint internal auditor for department); *see also* Gov't Code §§ 321.0131-.0134 (defining various types of audits), .0136, 2102.003 (defining types of audits), .005 (requiring state agencies to conduct internal audits), .007 (relating to duties of internal auditor). Based on your representations and our review, we agree section 552.116 is applicable to some of the information. However, in this case, the requestor specifically seeks certain e-mails, time sheets, and payroll hours, and does not

specifically ask for this information from the department's internal auditors. Thus, the information at issue is maintained independently of the audit working papers. Section 552.116 does not apply to records that exist independently of the audit working papers. *See id.* § 552.116(a) (if information in an audit working paper is also maintained in another record, that other record is not excepted from public disclosure by section 552.116). Accordingly, the department may not withhold this information under section 552.116 of the Government Code. Therefore, with the exception of the information we have marked for release, the department may withhold the remaining information under section 552.116 of the Government Code.

In summary, the department may withhold the information you have marked under section 552.107(1) of the Government Code. With the exception of the information we have marked for release, the department may withhold the remaining information under section 552.116 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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 611955

Enc. Submitted documents

c: Requestor
(w/o enclosures)