



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 13, 2016

Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County Attorney's Office  
Post Office Box 1748  
Austin, Texas 78767

OR2016-13370

Dear Ms. Sheely:

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# 614017. Because the ruling request involves litigation to which the Open Records Division is a party, preparation of this ruling has been assigned instead to the Opinion Committee.

The Travis County Attorney's Office (the "TCAO") received a request for information for the following:

All billing records submitted in connection with the prosecution of Governor Rick Perry (from inception to the current date), submitted by Michael McCrum and David Gonzalez, for their professional services in connection with the prosecution of Governor Rick Perry.

The total sum paid, and a breakdown of the payments (date and amount) made to Mr. McCrum and Mr. Gonzalez, from inception to current date, for their professional services in connection with the prosecution of Governor Rick Perry.

You state that the TCAO has responsive information in the context of serving as legal counsel to the Travis County Auditor and David Gonzalez and Michael McCrum. You claim

the information is excepted from disclosure as records of the judiciary and pursuant to sections 552.103, 552.107 and 552.111 of the Government Code. The representative sample you submit consists of a sample of billing records and some email communications. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You inform us that the TCAO is subject to an Agreed Protective Order in the matter of *Gonzalez v. Paxton*, No. D-1-GN-15-001200, whereby some of the information at issue in the instant request is to be disclosed only under the terms of the Agreed Protective Order. *Gonzalez v. Paxton*, No. D-1-GN-15-001200 (53rd Dist. Ct., Travis Cty., Tex. Apr. 30, 2015) (agreed protective order). Section 552.107(2) provides that information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” TEX. GOV’T CODE § 552.107(2). *See* Tex. Att’y Gen. ORD-143 (1976) at 1. Thus, pursuant to section 552.107(2), you must withhold information in this instant request that is included within the protective order.

We next consider your argument under section 552.103 of the Government Code, which provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

TEX. GOV’T CODE § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for

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<sup>1</sup>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.

information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston (1st Dist.) 1984, writ ref'd n.r.e.); Tex. Att’y Gen. ORD-551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that a lawsuit styled *Gonzalez v. Paxton*, No. D-1-GN-15-001200, was filed in the 53rd Judicial District Court of Travis County, Texas, on March 26, 2015, and was still pending when the TCAO received the instant request for information. You state the billing information at issue in the instant request was information received by the TCAO as part of communications and information received from the Travis County Auditor and David Gonzalez and Michael McCrum in the context of serving as their legal counsel. You tell us that the billing information sought in the instant request is related to the civil litigation filed by David Gonzalez against the Attorney General appealing the ruling OR2015-04787. We find litigation was pending when the TCAO received this request for information. We also find that the submitted billing information is related to the pending litigation for the purposes of section 552.103. Therefore, the TCAO may withhold the billing records under section 552.103(a) of the Government Code.<sup>2</sup> We note however that the applicability of section 552.103(a) ends once the litigation has concluded. Tex. Att’y Gen. Op. No. MW-575 (1982) at 1; Tex. Att’y Gen. ORD-350 (1982) at 3.

With respect to the email communications, we consider section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. TEX. 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. 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) (stating that the attorney-client “privilege does not apply if the attorney is acting in a capacity other than that of an attorney”). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the

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<sup>2</sup>Given our conclusion based on sections 552.103 and 552.107(1), we need not consider you arguments regarding other exceptions to disclosure.

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)-(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 to only 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding [mand. denied]) (stating that “the issue of confidentiality focuses on the intent of the parties at the time the communications are made”). 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) (recognizing that the privilege extends to the “entire communication, including facts contained therein”).

You tell us the emails are communications between the TCAO legal counsel and staff, as well as representatives of the TCAO’s client, and that they were made to facilitate the rendition of professional legal service to the Travis County Auditor’s Office and David Gonzales and Michael McCrum. You tell us the emails were not intended to be disclosed to third persons other than those to whom disclosure was made in the furtherance of the rendition of professional legal services to the client and those reasonably necessary for the transmission of the communications. You state further that these emails have remained confidential. Based on your representations and our review, we conclude that the email communications you have provided are 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](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,

A handwritten signature in cursive script that reads "Charlotte M. Harper".

Charlotte M. Harper  
Assistant Attorney General  
Opinion Committee

CMH/sdk

Ref: ID# 614017

Enc. Submitted documents

c: Requestor  
(w/o enclosures)