



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 21, 2016

Ms. Ann-Marie Sheely
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2016-14086

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# 614952.

The Travis County District Clerk's Office (the "district clerk's office") received three requests for all communications pertaining to the requestor, all communications pertaining to the requestor's previous requests for information, all information responsive to each of the requestor's previous requests for information which had not been produced to the requestor, and copies of all of the district clerk's office's official policies, rules, procedures, and directives. The district clerk's office states some information does not exist.¹ The district clerk's office claims some of the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions the district clerk's office claims and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the district clerk's office has marked some of the submitted information as non-responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the district clerk's office is not required to release such information in response to this request.

Next, the district clerk's office states the information it has marked was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2016-13237 (2016). As we have no indication the law, facts, and circumstances on which the prior ruling was based has changed, the district clerk's office may continue to rely on Open Records Letter No. 2016-13237 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.107(1) of the Government Code protects information coming 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. 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 district clerk's office states the remaining responsive information consists of confidential communications involving district clerk's office's attorneys, legal staff, and district clerk's office's employees in their capacities as clients. The district clerk's office states these communications were made in furtherance of the rendition of professional legal services to the district clerk's office. The district clerk's office states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the district clerk's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district clerk's office may withhold the remaining responsive information under section 552.107(1) of the Government Code.³

In summary, the district clerk's office may continue to rely on Open Records Letter No. 2016-13237 as a previous determination and withhold or release the identical information, which it has marked, in accordance with that ruling. The district clerk's office may withhold the remaining responsive information 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

³As our ruling is dispositive, we need not address the district clerk's office's remaining argument against disclosure of this information.

Ref: ID# 614952

Enc. Submitted documents

c: Requestor
(w/o enclosures)