



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 27, 2016

Mr. Joe H. Thrash
Assistant Attorney General
Administrative Law Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2016-14606

Dear Mr. Thrash:

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# 616005.

The Texas Historical Commission (the "commission"), which you represent, received a request for six categories of information pertaining to all State Antiquities Landmark Nominations filed with the commission for a specified location, including communications pertaining to the nominations and the location. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the commission has only submitted information responsive to some of the categories of information requested. We assume, to the extent any information responsive to the remaining categories existed on the date the commission received the request, the commission has released it. If the commission has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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 submitted information consists of communications involving commission staff and an attorney for the commission. You assert the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and indicate these communications have remained confidential. Upon review, we find the commission has demonstrated the applicability of the attorney-client privilege to the submitted information. Therefore, the commission may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note some of the e-mail strings at issue include e-mails received from parties you have not demonstrated are privileged parties. Furthermore, if these e-mails are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the commission maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then

the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

We note to the extent the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the e-mails also include e-mail addresses subject to section 552.137 of the Government Code.¹ Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). Accordingly, in the event the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release or section 552.137(c) applies.

In summary, the commission may generally withhold the submitted information under section 552.107(1) of the Government Code; however, if the commission maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. In the event the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release or section 552.137(c) applies, and must release the remaining information in the non-privileged e-mails.

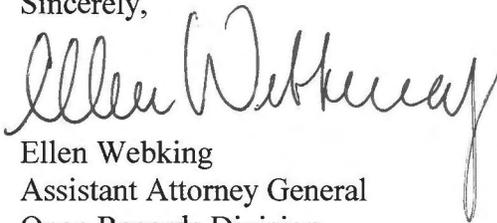
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 "Ellen Webking". The signature is written in black ink and is positioned to the right of the typed name.

Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 616005

Enc. Submitted documents

c: Requestor
(w/o enclosures)