



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 28, 2016

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

OR2016-14669

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 ("ORD") of this office and assigned ID #617793. Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General ("OAG") received a public information request for:

Any and all emails, memos, briefs or other correspondence to any member of the Open Records Division from a member of another division within the Attorney General's Office, including the attorney general, discussing records request challenges, complaints or requests for opinions submitted to the ORD by news media or by any agency responding to a records request submitted by a member of the news media. Please provide responsive documents from Jan. 20, 2015 to date.

You claim the requested information submitted in Exhibit B is excepted from disclosure under Government Code section 552.107(1). We have considered the exception you claim and reviewed the representative sample of information submitted in Exhibit B.¹

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach and therefore does not authorize the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* TEX. GOV'T CODE §§ 552.301(e)(1)(D), .302; Tex. Att'y Gen. ORD-499 (1988) at 6, ORD-497 (1988) at 4.

Section 552.107(1) of the Government Code 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 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 describe the ORD ruling process to include legal research, preparation, review and editing of an informal letter ruling by an assigned assistant attorney general. In your description you indicate that the ORD attorneys have no direct contact with interested parties from outside the ORD and “do not accept non-written briefings or arguments from interested parties.” You also state that no other division outside of ORD’s direct chain of command has any role or authority in the outcome of the informal rulings issued by ORD. You note that there are instances when a draft letter ruling file will be routed up ORD’s direct chain of command to Executive Administration for notification and that the communications

submitted in Exhibit B reflect these types of communications. You indicate on the documents in Exhibit B that the communications are between and among OAG attorneys and are for the purpose of providing professional legal advice to the OAG. Finally, you state that the communications are between privileged parties and are not intended to be disclosed to and have not been disclosed to non-privileged parties. Based on your representations and our review, we conclude that the information you have provided under Exhibit B is 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, 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,



Charlotte M. Harper
Assistant Attorney General
Opinion Committee

CMH/sdk

Ref: ID# 617793

Enc. Submitted documents

c: Requestor
(w/o enclosures)