



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 12, 2016

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2016-20569

Dear Ms. Harden:

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# 626222 (PIR No. 16-44565).

The Office of the Attorney General (the "OAG") received a request for e-mails sent or received by OAG employees relating to the State of Texas' vital statistics reporting. The OAG claims the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.¹

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*

¹We 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 that those records contain substantially different types of information than that submitted to this office.

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).

The OAG states the information at issue consists of communications between OAG attorneys and employees of the OAG’s client agencies, the Texas Health and Human Services Commission and the Texas Department of State Health Services. The OAG states these communications were made during the course of the OAG’s representation of its client agencies in specific legal matters. The OAG asserts the communications were made for the purpose of providing legal services to these agencies. Further, the OAG states these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Based on the OAG’s representations and our review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the submitted information. Thus, the OAG may generally withhold the submitted information under section 552.107(1) of the Government Code. We note, however, two of the e-mail strings include an e-mail received from and sent to individuals the OAG has not demonstrated are privileged parties. Furthermore, if the e-mail sent to and received from the non-privileged parties is removed from the e-mail strings and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the OAG separate and apart from the otherwise privileged e-mail strings in which it appears, then the OAG may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail strings, we note it contains information subject to section 552.137 of the

Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not excluded by subsection (c). Upon review, we find the OAG must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

In summary, the OAG may generally withhold the submitted information under section 552.107(1) of the Government Code. If the non-privileged e-mail, which we have marked, is maintained by the OAG separate and apart from the otherwise privileged e-mail strings in which it appears, then the OAG may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. To the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail strings, the OAG must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure, and must release the remaining information in this e-mail.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

²The 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).

Ref: ID# 626222

Enc. Submitted documents

c: Requestor
(w/o enclosures)