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ATTORNEY GENERAL OF TEXAS

February 16, 2016

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

OR2016-03703

Dear Ms. Harden:

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 (the "ORD") of this office and assigned ID# 598921. Preparation of the ruling has been assigned to the Opinion Committee.

You explain that the Office of the Attorney General (the "OAG") received a request for documents regarding a complaint made in connection with Open Records Letter No. 2015-07032A (Complaint ID# 586679). The OAG has released most of the responsive information, but you claim that the remaining responsive information is excepted from public disclosure under section 552.107(1) of the Government Code. You also assert an additional exception to disclosure under section 552.111 of the Government Code with respect to specific documents. We have considered the exceptions you claim and reviewed the representative sample of information you have submitted under the tab marked "Exhibit B."

Section 552.107(1) of the Government Code protects information that comes 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. *Tex. Att'y Gen. ORD-676 (2002)* at 6-7. 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. *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) (attorney-client privilege does not apply if an attorney “is 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 satisfy this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). 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 . . . 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding [mand. denied]). 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) (privilege extends to “entire communication, including facts contained therein”).

You state that the documents within Exhibit B include emails and notes between OAG attorneys and personnel, internal ORD tracking sheets, and draft enforcement letters. You specify that the tracking sheets are circulated with draft enforcement letters and are used by ORD attorneys to communicate their legal advice and opinions. You assert that all of the documents consist of or reveal confidential communications between privileged parties that were made for the purpose of providing professional legal services to the OAG. You also state that none of the communications in Exhibit B were intended to be disclosed and none have been disclosed to non-privileged parties. Based on your representations and our review, we find that all of the documents within Exhibit B constitute attorney-client communications made in furtherance of the rendition of legal services. Therefore, we conclude that the OAG may withhold the documents in their entirety under section 552.107(1) of the Government Code.¹

¹As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Becky P. Casares
Assistant Attorney General
Opinion Committee

BPC/sdk

Ref: ID# 598921

Enc. Submitted documents

c: Requestor
(w/o enclosures)