



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 15, 2016

Ms. Morgen Cuming  
Staff Attorney  
Texas Board of Professional Engineers  
1917 South Interstate 35  
Austin, Texas 78741-3702

OR2016-25441

Dear Ms. Cuming:

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# 634606.

The Texas Board of Professional Engineers (the "board") received a request for all memoranda and items received from other agencies related to a specific court decision. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although you also raise section 552.101 in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. Open Records Decision No. 676 at 1-2 (2002). Further, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD at 1-2.

<sup>2</sup>We 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.

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. ORD 676 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. *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 board states the submitted information consists of communications involving board attorneys and board executives. The board states the communications were made for the purpose of facilitating the rendition of professional legal services to the board and these communications have remained confidential. Upon review, we find the board has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the board may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note the e-mail strings at issue include an e-mail received from a non-privileged party. Furthermore, if this e-mail is removed from the e-mail strings and stands alone, it is responsive to the request for information. Therefore, if the board maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail strings in which it appears, then the board may not withhold this non-privileged e-mail under section 552.107(1) of the

Government Code. As you raise no further exceptions, the board must release the non-privileged e-mail, which we have marked, if it is maintained separate and apart.

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](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,



Kelly McWethy  
Assistant Attorney General  
Open Records Division

KSM/eb

Ref: ID# 634606

Enc. Submitted documents

c: Requestor  
(w/o enclosures)