



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 12, 2017

Ms. Sarah Stallberg
Assistant County Attorney
Open Records Division
Montgomery County
501 North Thompson, Suite 300
Conroe, Texas 77301

OR2017-00890

Dear Ms. Stallberg:

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# 641820 (ORR # 16PIA587).

The Montgomery County Sheriff's Office (the "sheriff's office") received a request for two specified documents and all e-mails and text messages sent or received by multiple named individuals during a certain time period concerning specified topics. You state the sheriff's office has released some information to the requestor. 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we address the requestor's contention that information believed to be similar or identical to the submitted information has already been made public. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a);

Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). However, we note section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the requestor does not state the information released to the public is identical to the submitted information. Further, we have no indication the information at issue has been released in its exact form to any members of the public. Accordingly, we find section 552.007 of the Government Code is inapplicable to the information at issue.

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. Open Records Decision No. 676 at 6-7 (2002). 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).

You state the submitted information consists of communications between attorneys for the sheriff's office and sheriff's office employees made in furtherance of the rendition of professional legal services to the sheriff's office. You state the communications were intended to be and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. Therefore, the sheriff's office may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note a portion of the otherwise privileged e-mail string includes an e-mail from a non-privileged party. Furthermore, if this e-mail is removed from the submitted e-mail string and stands alone, it is responsive to the instant request. Therefore, if the sheriff's office maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the sheriff's office may not withhold the 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 string in which it appears, we note a portion of the e-mail is subject to section 552.137 of the Government Code.¹ 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 address at issue is not excluded by subsection (c). Therefore, the sheriff's office must withhold the e-mail address we have marked under section 552.137, unless the owner affirmatively consents to its public disclosure.

In summary, the sheriff's office may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the sheriff's office maintains the non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the sheriff's office may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code, and must release this information. Within the information we have marked as non-privileged, the sheriff's office must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public 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.

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).

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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a horizontal line through the middle of the letters.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/eb

Ref: ID# 641820

Enc. Submitted documents

c: Requestor
(w/o enclosures)