



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2017

Ms. Kathleen Contreras
Legal Services Coordinator
Office of Injured Employee Counsel
7551 Metro Center Drive, Suite 100
Austin, Texas 78744

OR2017-09747

Dear Ms. Contreras:

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# 656666.

The Office of Injured Employee Counsel (the "OIEC") received a request for information related to the requestor's termination and any communications from the requestor's potential employers. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. 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 information you marked in Attachment B consists of communications between OIEC attorneys and OIEC employees. You also state the communications were made for the purpose of facilitating the rendition of legal advice to the OIEC and the confidentiality of the communications has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the OIEC may withhold the information you marked in Attachment B under section 552.107(1) of the Government Code.¹

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information other statutes make confidential, including section 404.111 of the Labor Code, which provides, in part:

(a) When assisting an injured employee, the [OIEC] is entitled to the same access to information related to the employee’s injury and workers’ compensation claim as the employee or any other party to the claim.

...

(e) The [OIEC] may not make public any confidential information provided to the [OIEC] under this chapter. . . . The [OIEC] may not release, and an individual or entity may not gain access to, any information that:

(1) could reasonably be expected to reveal the identity of a health care provider or an injured employee; [or]

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(2) reveals the zip code of an injured employee's primary residence[.]

...

(f) Information collected or used by the [OIEC] under this chapter is subject to the confidentiality provisions and criminal penalties of Section 402.091 [of the Labor Code].

(g) Information on health care providers and injured employees that is in the possession of the [OIEC], and any compilation, report, or analysis produced from the information that identifies providers and injured employees, is not:

(1) subject to discovery, subpoena, or other means of legal compulsion for release to any individual or entity; or

(2) admissible in any civil, administrative, or criminal proceeding.

Labor Code § 404.111(a), (e)-(g); *see also id.* § 404.002 (establishing the OIEC). Section 402.091 of the Labor Code makes it a criminal offense to “knowingly, intentionally, or recklessly publish[], disclose[], or distribute[] information that is confidential under [subchapter E of chapter 402 of the Labor Code] to a person not authorized to receive the information directly from the [Division of Workers’ Compensation of the Texas Department of Insurance (the “division”)].” *Id.* § 402.091(a). Section 402.083 of the Labor Code is part of subchapter E of chapter 402 and provides, in part, that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by this subtitle or other law.” *Id.* § 402.083(a).

This office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 10 (1993). Prior decisions of this office have found that information revealing the date of injury, as well as an injured employee’s name, beneficiary name, claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore confidential under section 402.083.

You claim the information you marked in Attachment C constitutes claim information made confidential under section 402.083 of the Labor Code. You indicate this information was obtained from the division’s claim files pursuant to the access granted to the counsel under section 404.111 of the Labor Code. Based on your representations and our review of the submitted information, we find the information we marked, which consists of injured employees’ names and corresponding claim numbers, implicitly or explicitly identifies injured employees. Thus, we conclude the OIEC must withhold the information we marked in Attachment C under section 552.101 of the Government Code in conjunction with section 404.111(e) of the Labor Code. However, we find the remaining information you

marked is not confidential under section 404.111, and the remaining information at issue may not be withheld under section 552.101 of the Government Code on that basis.

In summary, the OIEC may withhold the information you marked in Attachment B under section 552.107(1) of the Government Code. The OIEC must withhold the information we marked in Attachment C under section 552.101 of the Government Code in conjunction with section 404.111(e) of the Labor Code. The OIEC must release the remaining information.²

You also ask this office to issue a previous determination that would permit the OIEC to withhold information under section 552.101 of the Government Code in conjunction with section 404.111 of the Labor Code without the necessity of again requesting a decision under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). We decline to issue such a decision at this time. This letter ruling is limited to the particular records 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 records 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/bw

Ref: ID# 656666

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the requestor has a special right of access to some of the information being released. Gov't Code § 552.023. Accordingly, if the OIEC receives another request for this same information from a different requestor, the OIEC must again seek a ruling from this office.