



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 5, 2017

Ms. Diane Morris  
Deputy General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2017-27539

Dear Ms. Morris:

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# 689941 (ORR# 17-362).

The Office of the Governor (the "OOG") received a request for "memoranda provided to [the OOG] pertaining to executions as well as any supporting documentation, including that provided by the Texas Board of Pardon and Paroles [the 'board']." The OOG claims the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. The OOG also states it notified the board of the OOG's receipt of the request for information and of the board's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received correspondence from the board objecting to the release of some of the information at issue. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

---

<sup>1</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 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 508.313 of the Government Code, which provides in relevant part, the following:

(a) All information obtained and maintained [by the Texas Department of Criminal Justice (the “department”)], including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the department ] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) The department, on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

(1) the governor;

(2) a member of the board or a parole commissioner;

(3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

*Id.* § 508.313(a), (c). Section 508.313 requires the department to transfer information to the board and the governor for consideration in clemency matters; such a transfer does not affect the confidentiality of the information. *See id.* § 508.313(c). The OOG states the board transferred Exhibit C to the OOG for consideration in a clemency matter. Based on this representation, we agree the OOG must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

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).

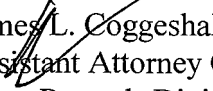
The OOG explains Exhibit B consists of confidential communications between the governor and OOG attorneys and staff that were made in furtherance of the rendition of professional legal services. The OOG also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the OOG has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the OOG may withhold Exhibit B under section 552.107(1) of the Government Code.

In summary, the OOG must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. The OOG may withhold Exhibit B under section 552.107(1) of the Government Code.

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,

  
James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tdw

Ref: ID# 689941

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)