



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 22, 2017

Ms. Sarah E. Alexander  
Warrant Officer 1 - Legal Administrator  
Texas Military Department  
P.O. Box 5218  
Austin, Texas 78763-5218

OR2017-29116

Dear Ms. Alexander:

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# 689174.

The Texas Military Department (the "department") received a request for information, including records, investigations, and communications, pertaining to the requestor's client, records or statements made by a named individual, and records and notes regarding specified meetings. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.<sup>1</sup> Additionally, you state release may implicate the interests of the National Guard Bureau, Office of Complex Investigations (the "OCI"); National Guard Regional Special Victims Unit, West Region ("SVU"); Saratoga Springs Police Department ("Saratoga"); and Utah National Guard ("Utah"). Accordingly, you state you notified the OCI, SVU, Saratoga, and Utah of the request for information pursuant to section 552.304 of the Government Code. *See Gov't Code* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have received and considered comments from Saratoga and

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<sup>1</sup>We note the department did not comply with section 552.301 of the Government Code in requesting this decision. *See Gov't Code* § 552.301(b), (e). Nonetheless, because section 552.101 of the Government Code and the attorney client privilege can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352; *see also Paxton v. City of Dallas*, No. 15-0073, 2017 WL 469597 (Tex. Feb. 3, 2017).

Utah. We have considered the submitted arguments and reviewed the submitted information. We have also received comments from the requestor. *Id.*

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 Enclosure 3 consists of communications between attorneys for the department, department officials, and other privileged parties for the purpose of providing legal services to the department. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Enclosure 3 consists of privileged attorney-client communications the department may

generally withhold under section 552.107(1) of the Government Code.<sup>2</sup> We note, however, some of these e-mail strings include e-mails or attachments received from or sent to non-privileged parties. Furthermore, if the communications received from or sent to non-privileged parties are removed from the e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails or attachments, which we marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails or attachments under section 552.107(1) of the Government Code.

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. Section 552.101 encompasses section 437.232 of the Government Code, which provides as follows:

(a) In this section, “military personnel information” means a service member’s name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

(b) A service member’s military personnel information is confidential and not subject to disclosure under Chapter 552.

*Id.* § 437.232. Upon review, we find portions of the non-privileged e-mails and attachments contain military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing “service member” for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that “Texas military forces” for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). We note section 437.232 was intended to protect the privacy interests of military personnel. *See* Senate Research Center, Bill Analysis, H.B. 2152, 84<sup>th</sup> Leg., R.S. (2015) (explaining provision intended to protect military personnel and their families during deployment). Accordingly, the requestor has a right of access to his client’s information pursuant to section 552.023 of the Government Code and it may not be withheld from him. *See* Gov’t Code § 552.023(a) (“person or a person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure for this information.

requests information concerning herself). Accordingly, with the exception of the information we marked for release and the information pertaining to the requestor's client, the department must withhold the information you marked and the additional information we marked to withhold under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. However, you have failed to demonstrate section 437.232 is applicable to the information we marked for release. Therefore, the department may not withhold the information we marked for release under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82.

Upon review, we find the documents at issue in Enclosures 4 and 5 contain information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. Generally, only highly intimate information that implicates the privacy of the individual is withheld. However, in certain instances, the entire document must be withheld to protect the individual's privacy. In this instance, withholding only the individual's identity or certain details of the information at issue from this requestor would not preserve the subject individual's common-law right of privacy. Accordingly, to protect the privacy of the individual to whom the information relates, the department must withhold Enclosures 4 and 5 in their entireties under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may generally withhold Enclosure 3 under section 552.107(1) of the Government Code; however, the department may not withhold the marked non-privileged e-mails and attachments if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. In releasing the non-privileged information, with the exception of the information we marked for release and the information pertaining to the requestor's client, which much be released, the department must withhold the information you marked and the additional information we marked to withhold under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The department must withhold Enclosures 4 and 5 in their entireties under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.

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,

A handwritten signature in black ink that reads "Emily Kunst". The signature is written in a cursive style with a large, looped "E" and a long, sweeping "K".

Emily Kunst  
Assistant Attorney General  
Open Records Division

EK/tdw

Ref: ID# 689174

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)