



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 22, 2017

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2017-29167

Dear Ms. Harden:

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# 690732.

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was originally received by the Open Records Division ("ORD") of this office and assigned ID #690732. Because ORD possessed documents responsive to the request, preparation of this ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (the "OAG") received Public Information Act requests on October 16, 2017, from Mr. R.S. Gates, Mr. Jim Parks, Mr. Brent McCain, and Mr. Eric Schafer. The four requestors are seeking information pertaining to two open records enforcement complaints. You indicate that the OAG will release most of the requested information. You state that other responsive information is excepted from disclosure under sections 552.107 and 552.101 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted as Exhibits B and C.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. TEX. 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. Tex.

Att’y Gen. ORD-676 (2002) at 6–7. First, a governmental body must demonstrate “the information constitutes or documents a communication.” *Id.* at 7. Second, the communication must have been made for the purpose of facilitating “the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See id.* 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, meaning it was “not intended to be disclosed to third persons other than those . . . to whom disclosure is made to further the rendition of professional legal services to the client [or those] 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 [mand. denied]). 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) (orig. proceeding) (privilege extends to “entire communication, including facts contained therein”).

You state that the documents in Exhibit B reveal communications between and among OAG attorneys and personnel. The documents consist of internal ORD tracking sheets, which you state are part of the communications between ORD attorneys and staff used in the process of drafting, reviewing, editing, and revising draft letter rulings before issuance. You inform us the tracking sheets are circulated with the drafts and are used by ORD attorneys to communicate their legal advice and opinions. You tell us further that the tracking sheets in Exhibit B were not intended to be disclosed and that none have been disclosed to non-privileged parties. Based on your representations and our review, we find that the information you have marked under Exhibit B consists of privileged attorney-client communications and may be withheld under section 552.107(1) of the Government Code.

Additionally, you contend that the marked information in Exhibit C contains criminal history record information, excepted from disclosure under section 552.101 of the Government Code. *See* TEX. GOV’T CODE § 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* This exception encompasses criminal history record information made confidential by other statutes. *See id.* (excepting from disclosure information considered confidential by statutory law). Title 28, part 20 of the Code of Federal Regulations governs the release of criminal history record information that states obtain from the federal government or other states. 28 C.F.R. §§ 20.1–38. The federal regulations allow

each state to follow its individual law with respect to the criminal history record information it generates. *See* Tex. Att’y Gen. ORD-565 (1990) at 10–12. Section 411.083 of the Government Code deems confidential criminal history record information the Department of Public Safety (“DPS”) maintains, and DPS may disseminate the information only as provided in chapter 411. *See* TEX. GOV’T CODE § 411.083. Criminal justice agencies and other entities specified in chapter 411 of the Government Code are entitled to obtain criminal history record information from DPS or another criminal justice agency; however, those entities also may not release the information except as provided by chapter 411. *See id.* §§ 411.083(b)(1), 411.089(a), 411.089(b)(1), 411.090–.1410. Thus, criminal history record information obtained from DPS or any other criminal justice agency is confidential and must be withheld under section 552.101 of the Government Code. *See id.* § 552.101.

You represent that the information marked in Exhibit C is criminal history record information generated by the National Crime Information Center and the Texas Crime Information Center. Upon review, we find the information you marked consists of confidential criminal history record information. *See id.* § 411.082(2) (“‘Criminal history record information’ means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.”). Accordingly, the information you marked in Exhibit C must be withheld under section 552.101 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, 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,



Ashley Franklin
Assistant Attorney General
Opinion Committee

AF/som

Ref: ID# 690732

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)