



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 31, 2019

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

OR2019-02914

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# 752515 (PIR No. 18-51049).

The Office of the Attorney General (the "OAG") received a request for all information pertaining to a specified motor vehicle accident involving the requestor's client. The OAG states it will release some of the responsive information with redactions allowed by law. The OAG claims the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions the OAG asserts and reviewed the submitted representative sample of information.<sup>1</sup>

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 information made confidential by other statutes, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations

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<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 that those records contain substantially different types of information than that submitted to this office.

Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has determined the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).* We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” *Open Records Decision No. 546 (1990).* Upon review, we find Exhibit C constitutes confidential medical records under the MPA. Accordingly, the OAG must withhold Exhibit C under section 552.101 of the Government Code in conjunction with the MPA.<sup>2</sup>

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. *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

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<sup>2</sup>This ruling does not affect an individual's right of access to a patient's medical records from the physician who provided treatment under the MPA. *See Occ. Code §§ 159.004-.006; cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (MPA does not provide patient general right of access to his or her medical records from governmental body responding to request for information under the Act).

communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. *See* 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. *See 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. *See* TEX. R. EVID. 503(b)(1). 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. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.*, 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).

The OAG states some of Exhibit B consists of communications between attorneys in the OAG’s Tort Litigation Division (the “TLD”) and its client agency, the Texas Department of Public Safety (the “department”). The OAG also states the remaining communications in Exhibit B consist of communications between attorneys and staff of the TLD. The OAG informs us these communications occurred during the TLD’s representation of the department in a certain legal matter. The OAG represents the communications at issue were made for the purpose of providing professional legal services to the department. Upon review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the OAG may generally withhold Exhibit B under section 552.107(1) of the Government Code. However, we note one of the otherwise privileged e-mail strings in Exhibit B includes an e-mail received from the requestor’s client, a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the instant request. Therefore, if the OAG 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 OAG may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. In this instance,

as the OAG raises no other argument for this information, the OAG must release the non-privileged e-mail.

In summary, the OAG must withhold Exhibit C under section 552.101 of the Government Code in conjunction with the MPA. The OAG may generally withhold Exhibit B under section 552.107(1) of the Government Code. However, if the OAG maintains the non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, the OAG must release the non-privileged e-mail.<sup>3</sup>

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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/eb

Ref: ID# 752515

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>To the extent the non-privileged e-mail we have marked is maintained by the OAG separate and apart from the otherwise privileged e-mail string in which it appears, we note the requestor has a right of access to his client's own personal e-mail address. *See* Gov't Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).