



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2019

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

OR2019-06325

Dear Ms. Harden:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division ("ORD") of this office and assigned ID# 758363. Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General ("OAG") received a public information request from Lucius Lomax for a description of Captain James Ferguson's duties regarding open records requests, names of members of the ORD and committee, all emails to and from James Ferguson, Lauren Downey, and Katherine Cary mentioning the requestor's name or requests, the name and email of Ms. Cary's supervisor as well as her job description, tenure and previous posts with the OAG. You tell us that while the OAG does not maintain some of the requested information, you will release most of the responsive information to the extent it exists. You claim the remaining responsive information submitted in Exhibit B is excepted from disclosure under Government Code section 552.107. We have considered the exception you claim and reviewed the representative sample of the information submitted in Exhibit B.¹

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach and therefore does not authorize the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. See TEX. GOV'T CODE §§ 552.301(e)(1)(D), .302; Tex. Att'y Gen. ORD-499 (1988) at 6, ORD-497 (1988) at 4.

Section 552.107(1) of the Government Code protects information that comes 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). 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), *mand. denied*, 12 S.W.3d 807 (Tex. 2000) (stating that the attorney-client "privilege does not apply if the attorney is acting in a capacity other than that of an 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)–(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 to only a confidential communication, *id.* 503(b)(1), 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]) (stating that "[t]he issue of confidentiality focuses on the intent of the parties at the time the communications are made"). 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) (recognizing that the privilege extends to the "entire communication, including facts contained therein").

You state that the information in Exhibit B consists of internal communications between attorneys and staff of various OAG divisions. You tell us the communications pertain to how the OAG should handle the requestor who had threatened an employee of the OAG. You tell us further that the communications at issue were between privileged parties and were made for the purpose of providing professional legal services to the OAG. You also tell us that the communications were not intended to be disclosed and have not 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. Therefore, the OAG may withhold the information you have marked 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, 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,



Charlotte M. Harper
Assistant Attorney General
Opinion Committee

CH/eb

Ref: ID# 758363

Enc. Submitted documents

c: Requestor
(w/o enclosures)