



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 2, 2019

Mr. Adam Bitter
General Counsel
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

OR2019-18243

Dear Mr. Bitter:

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# 770541.

The Office of the Secretary of State (the "secretary's office") received a request for information referring to or relating to a certain advisory, including certain documents, internal communications of the secretary's office, and communications with named state agencies, specified individuals, specified state officials, a specified administration, and specified types of third parties. You state the secretary's office does not possess some of the requested communications.¹ You also state the secretary's office has released some of the requested information and will redact some information pursuant to sections 552.130(c) and 552.136(c) of the Government Code and Open Records Decision No. 684 (2009).² You

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.139 of the Government Code. Further, you state the secretary's office has notified the Office of the Attorney General (the "OAG") and the Texas Department of Public Safety of the request for information and of their rights to submit arguments to this office as to why the submitted 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 comments from the OAG. We have considered the submitted arguments and reviewed the submitted representative samples of information.³

Initially, we note the request in this instance is made on behalf of the United States House of Representatives Committee on Oversight and Reform. You state the secretary's office is responding to the request pursuant to the Act. *See* Open Records Decision No. 44 at 2 (1974) (a written communication that reasonably can be judged to be a request for public information is a request for information under the Act). A governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 (1990). Additionally, this office is statutorily bound to issue an open records decision after receiving a request for a ruling from a governmental body. *See* Gov't Code § 552.306(a) (requiring this office to "promptly render a decision requested under [the Act], consistent with the standards of due process, determining whether the requested information is within one of the exceptions of [the Act]"); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.) (noting Act requires this office to determine what information is excepted from disclosure); Open Records Decision No. 687 at 3 (2011) (noting section 552.306 directs this office "in mandatory language" to rule when a governmental body requests an open records ruling). The secretary's office received a request for information for which it requested a decision about whether the responsive information is subject to an exception under the Act. *See* Gov't Code § 552.301. Therefore, pursuant to the Act, this office must issue a ruling on whether the information at issue may be withheld under the Act. Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

Next, you state and we agree some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2019-10080 (2019). In that ruling, we determined the secretary's office may withhold certain information under section 552.108(a)(1) of the Government Code on behalf of the OAG and may withhold the remaining information under section 552.107(1) of the Government Code. There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, with regard to the information that was the subject of the previous ruling, the secretary's office may continue to rely on Open Records Letter No. 2019-10080

³We 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.

as a previous determination and withhold that information in accordance with that ruling.⁴ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, the remaining information you have submitted was not at issue in the previous ruling. Accordingly, we will address the arguments against disclosure of this information.

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). 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.*, 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).

⁴As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

You state the information you have marked constitutes communications between secretary's office attorneys, secretary's office employees, and other privileged parties that were made for the purpose of providing legal services to the secretary's office. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the remaining information you have marked consists of privileged attorney-client communications the secretary's office may withhold under section 552.107(1).⁵

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency . . . that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body asserting section 552.108(a)(1) must explain how and why the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1976). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Thus, where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The OAG has advised this office the information at issue relates to an open criminal investigation conducted by the OAG's Election Fraud Section of its Criminal Prosecutions Division. Further, the OAG states release of the information at issue would interfere with the pending investigation. Based upon these representations, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the remaining information and the secretary of state's office may withhold it under section 552.108(a)(1) on behalf of the OAG.⁶

In summary, with regard to the information that was the subject of the previous ruling, the secretary's office may continue to rely on Open Records Letter No. 2019-10080 as a previous determination and withhold that information in accordance with that ruling. The secretary's office may withhold the remaining information you have marked under section 552.107(1) of the Government Code. The secretary's office may withhold the remaining information under section 552.108(a)(1) of the Government Code on behalf of the OAG.

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁶As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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,



Justin Gordon
Assistant Attorney General
Open Records Division

JG/gw

Ref: ID# 770541

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)