



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 29, 2019

Mr. Joseph Behnke
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2019-20708

Dear Mr. Behnke:

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# 782394 (OOG PIR # 227-19).

The Office of the Governor (the "governor's office") received a request for communications pertaining to a specified topic during a specified time period. You claim some of the requested information is subject to previous rulings. You also claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of the Texas Department of Public Safety ("DPS"), the Office of the Attorney General (the "OAG"), and the Office of the Secretary of State (the "secretary of state's office"). Accordingly, you state you notified the third parties of the request and of their right to submit arguments to this office. *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 comments from the secretary of state's office. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, you state some of the requested information was the subject of previous requests for a ruling, as a result of which this office issued Open Records Letter Nos. 2019-10230

¹ We assume that 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.

(2019) and 2019-20701. There is no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the governor's office may continue to rely on Open Records Letter Nos. 2019-10230 and 2019-20701 as previous determinations and withhold or release the information at issue in accordance with those rulings.² 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).

Next, we note the submitted information contains a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). The Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the court-filed document.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

² As we are able to make this determination, we need not address the arguments against the disclosure of this information.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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 reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the information you marked consists of part of a communication between attorneys for the governor’s office, governor’s office employees and officials, and other privileged parties made for the purpose of facilitating the rendition of professional legal services to the governor’s office. You state this communication was intended to be and has remained confidential. Upon review, we find you established the information at issue constitutes part of a privileged attorney-client communication under rule 503. Thus, the governor’s office may withhold the court-filed document you marked under Texas Rule of Evidence 503.³

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state the information you marked consists of communications between attorneys for the governor’s office, governor’s office employees and officials, and other privileged parties made for the purpose of facilitating the rendition of professional legal services to the governor’s office. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

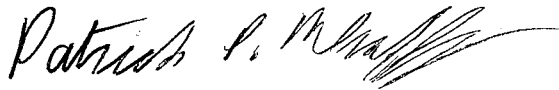
information at issue consists of privileged attorney-client communications. Thus, the governor's office may withhold the information you marked under section 552.107(1) of the Government Code.⁴

In summary, the governor's office may continue to rely on Open Records Letter Nos. 2019-10230 and 2019-20701 as previous determinations and withhold or release the information at issue in accordance with those rulings. The governor's office may withhold the court-filed document you marked under Texas Rule of Evidence 503. The governor's office may withhold the information you 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/eb

Ref: ID# 782394

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)

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