



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

August 9, 2019

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

OR2019-22052

Dear Ms. Downey:

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# 782641. Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General ("OAG") received a public information request from Terrence Lamont Dillard for information related to a prior request for a letter ruling identified by name of the requesting county attorney and by reference to numbers ID #768093, ORR 19PIA0204, and OR2019-1462. You state that the OAG has released some of the requested information. However, you claim some information responsive to the current request, submitted in Exhibit B, is excepted from disclosure under Government Code section 552.107. We have considered the exception you claim and reviewed the submitted information in Exhibit B.

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 documents in Exhibit B consist of internal OAG’s Open Records Division (“ORD”) tracking sheets, which reveal communications between and among OAG attorneys and staff. You tell us the internal ORD tracking sheets are part of the communications between ORD attorneys and staff and are used in the process of drafting, reviewing, editing, and revising open records letter rulings before their issuance in final form. 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 that none of the communications in Exhibit B were intended to be disclosed and that none have been disclosed to non-privileged parties. You assert that these communications consist of confidential communications between privileged parties that were made for the purpose of providing professional legal services to the OAG and are excepted from public disclosure. 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.

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,



Charlotte M. Harper  
Assistant Attorney General  
Opinion Committee

CMH/eb

Ref: ID# 782641

Enc. submitted documents

c: requestor  
(w/o enclosures)