



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 10, 2019

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

OR2019-25317

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# 785557 (ORR 257-19).

The Office of the Governor (the "governor's office") received a request for documents, written communications, contracts, and invoices between named entities and the governor's office concerning a specified event.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of the United States Department of Homeland Security.² See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have

¹We note the governor's office sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²As of the date of this letter, we have not received any comments from the United States Department of Homeland Security explaining why any of the submitted information should not be released.

considered the exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *Id.*

Initially, we note you have marked a portion of the submitted information as not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the governor's office is not required to release such information in response to this request.

Next, we note some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-22702 (2019). In that ruling, we determined the governor's office may withhold the responsive information it marked under section 552.107(1) of the Government Code and must withhold the responsive information it marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the governor's office must rely on Open Records Letter No. 2019-22702 as a previous determination and withhold the responsive information at issue 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the remaining responsive information not subject to the previous ruling.

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. 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

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.

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

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.* 503(b)(1), 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).

You state the remaining responsive information consists of communications between attorneys for the governor’s office, officials and staff of the governor’s office in their capacities as clients, and other privileged parties. You state these communications were made in furtherance of the rendition of professional legal services to the governor’s office. You state these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining responsive information. Accordingly, the governor’s office may withhold the remaining responsive information under section 552.107(1) of the Government Code.⁵

In summary, the governor’s office must rely on Open Records Letter No. 2019-22702 as a previous determination and withhold the responsive information at issue in accordance with that ruling. The governor’s office may withhold the remaining responsive information under section 552.107(1) of the Government Code.

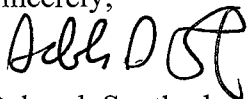
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

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

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,



Deborah Southerland
Attorney
Open Records Division

DS/mo

Ref: ID# 785557

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)