



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 14, 2020

Ms. Charmaine Backens  
Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2020-01344

Dear Ms. Backens:

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# 806111 (TCEQ PIR No 20503338).

The Texas Commission on Environmental Quality (the "commission") received a request for a specified letter and information pertaining to a specified enforcement case. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note most of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-14284 (2019). In that ruling, we concluded the following: (1) with the exception of the information the opposing party has seen or provided, the commission may withhold the information it indicated under section 552.103 of the Government Code; (2) the commission may generally withhold the information it indicated under section 552.107(1) of the Government Code; however, the commission may not withhold certain marked non-privileged e-mails if they are maintained by the commission separate and apart from

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<sup>1</sup> We understand the commission to raise section 552.137 of the Government Code based on its markings.

<sup>2</sup> We 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 that those records contain substantially different types of information than that submitted to this office.

the otherwise privileged e-mail strings in which they appear; (3) the commission may generally withhold certain information we marked under section 552.104(a) of the Government Code; however, to the extent any of the information at issue constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release it in accordance with federal law; and (4) the commission must release the remaining information. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the commission may continue to rely on Open Records Letter No. 2019-14284 as a previous determination and withhold or release the information previously ruled upon in accordance with that ruling. *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). As the remaining information at issue was not subject to Open Records Letter No. 2019-14284, we will consider your arguments against its disclosure.

Section 552.107(1) of the Government Code protects information subject to 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).

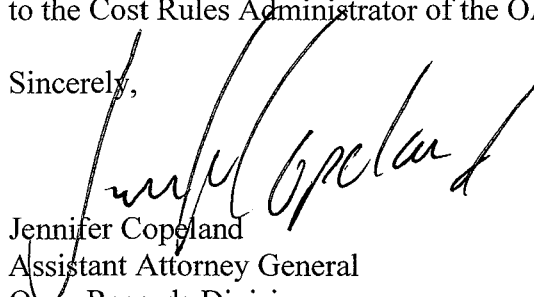
You state the remaining information constitutes communications between attorneys representing the commission and commission employees that were made for the purpose of facilitating the rendition of professional legal services to the commission. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the commission may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the commission may continue to rely on Open Records Letter No. 2019-14284 as a previous determination and withhold or release the information previously ruled upon in accordance with that ruling. The commission may withhold the remaining 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 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,



Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/jxd

Ref: ID# 806111

Enc. Submitted documents

c: Requestor  
(w/o enclosures)