



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2020

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

OR2020-05042

Dear Ms. Harden:

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# 816837. Because ORD possessed documents responsive to the request, preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (“OAG”) received a public information request from Phillip Haskett for “[a]ll communications via telephone, email, or letter regarding [his] TPIA complaint . . . against the San Leon Municipal Utility District.” You state that the OAG will release the responsive information except for the submitted document. This document, submitted in Exhibit B, you assert 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 document in Exhibit B is a communication between OAG attorneys regarding the handling of an open records complaint file. You tell us the communication in Exhibit B was not intended to be disclosed and has not been disclosed to non-privileged parties. You inform us that the communication is a confidential communication between privileged parties that was made for the purpose of providing professional legal services to the OAG. Based on your representations and our review, we find that the information in 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,

A handwritten signature in cursive script that reads "Charlotte M Harper".

Charlotte M. Harper
Assistant Attorney General
Opinion Committee

CMH/eb

Ref: ID# 816837

Enc. Submitted documents

c: Requestor
(w/o enclosures)