



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

OR2020-05043

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# 818072. 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 Ms. Hester Anne Brown regarding an email address for a particular OAG employee as well as for information regarding a report created by the Texas Health and Human Services Commission ("Commission"). You state that the OAG will release the requested email address. With respect to the requested report, you tell us the OAG does not oversee the Commission or any of its employees and does not maintain information regarding the nature of reports created by or any investigations conducted by the Commission. The OAG also received a fourteen-item request from the requestor seeking any contact the Public Information Coordinator's office had with any other state agency regarding the processing of her initial request. You tell us the OAG did not reach out to any other state agency regarding the processing of her initial request, the OAG has no records responsive to that part of her request. However, you state that the Public Information Coordinator's office did communicate with various divisions of the OAG and has responsive information. You assert this information, submitted as a representative sample in Exhibit B, is excepted from disclosure under Government Code section 552.107. We have considered the exception you claim and reviewed the representative sample of submitted information in Exhibit B.¹

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Tex. Att'y Gen. ORD-499 (1988) at 6, ORD-497 (1988) at 4. This

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 Exhibit B consists of internal communications between an attorney of the Public Information Coordinator’s Office and attorneys and staff of other divisions of the OAG. You state further that these communications pertain to the processing of the requestor’s initial request. 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 inform us that the communications are confidential communications between privileged parties that were made for the purpose of providing professional legal services to the OAG.

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 those submitted to this office.

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,



Charlotte M. Harper
Assistant Attorney General
Opinion Committee

CMH/eb

Ref: ID# 818072

Enc. Submitted documents

c: Requestor
(w/o enclosures)