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ATTORNEY GENERAL OF TEXAS

December 7, 2020

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2020-30458

Dear Ms. Soucy:

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# 855623 [Ref. No. 29082].

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for e-mail communications between two named individuals during a specified period of time. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.143 of the Government Code. We have considered the exceptions you claim reviewed the submitted representative sample of information.¹

Section 552.107(1) of the Government Code protects information coming within 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

¹We 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.

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)(A), (B), (C), (D), (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 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).

The comptroller’s office states the information it indicated constitutes communications between and among comptroller’s office attorneys and staff made for the purpose of facilitating the rendition of professional legal services to the comptroller’s office. The comptroller’s office states the information at issue represents confidential communications that have been maintained as confidential and have not been disclosed to non-privileged parties. Based on these representations and our review, we find the information the comptroller’s office indicated consists of privileged attorney client communications the comptroller’s office may withhold under section 552.107(1) of the Government Code.

Section 552.143 of the Government Code provides the following, in relevant part:

(b) Unless the information has been publicly released, pre investment and post investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

(c) All information regarding a governmental body’s direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2) (9), (11), or (13) (16) is confidential and excepted from the requirements of Section 552.021. This subsection does not apply to a governmental body’s purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund’s investment in restricted securities. This subsection applies to

information regarding a direct purchase, holding, or disposal of restricted securities by the Texas growth fund, created under Section 70, Article XVI, Texas Constitution, that is not listed in Section 552.0225(b).

Gov't Code § 552.143(b)-(c). The comptroller's office states the information it indicated consists of due diligence information prepared for the comptroller's office by private third parties "related to the evaluations of private equity investments and other types of investments[.]" We have no indication the comptroller's office has publicly released any of the information at issue. The comptroller's office also states section 552.0225 of the Government Code is not applicable to the information at issue. Further, we understand this information is not subject to disclosure pursuant to section 552.143(c). Based on these representations and our review, we conclude the comptroller's office must withhold the information it indicated under section 552.143(b) of the Government Code.

In summary, the comptroller's office may withhold the information it indicated under section 552.107(1) of the Government Code. The comptroller's office must withhold the information it indicated under section 552.143(b) 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,

Paige Lay
Assistant Attorney General
Open Records Division

PL/be

Ref: ID# 855623

c: Requestor