



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 28, 2022

Mr. Kieran Hillis
Public Information Coordinator & Assistant General Counsel
The Office of Governor Greg Abbott
P.O. Box 12428
Austin, Texas 78711

OR2022-02583

Dear Mr. Hillis:

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# 928690 (OOG ID# 618-21).

The Office of the Governor (the "governor's office") received a request for certain communications pertaining to certain topics or containing specified keywords during a stated period of time.¹ You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, you indicate and we agree, some of the submitted information is not responsive to the instant request for information because it was created after the date the governor's office received the instant request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983)*. This ruling does not address the public availability of any information that

¹ The governor's office states it 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² Although the governor's office does not raise section 552.137 of the Government Code in its brief, we understand the governor's office to raise this exception based on its markings.

is not responsive to the request and the governor's office is not required to release such information in response to this request.

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 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 information you have marked consists of communications involving attorneys for the governor's office and governor's office employees and officials in their capacities as clients. You also state these communications were made in furtherance of the rendition of professional legal services to the governor's office. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the governor's office may generally withhold the information you have marked under section 552.107(1) of the Government Code.³ However, we note one of these otherwise privileged e-mail strings

³ In this instance, as our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

includes an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which it appears, then the governor's office may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public. *Id.* § 552.137(c)(4). The e-mail address you have marked is specifically excluded by section 552.137(c)(4). Consequently, the governor's office may not withhold the e-mail address at issue under section 552.137 of the Government Code.

In summary, the governor's office may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail we have marked is maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which it appears, then the governor's office must release this information. The governor's office must release the remaining responsive information.

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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/be

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Enc. Submitted documents

c: Requestor
(w/o enclosures)