



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 17, 2022

Ms. Deborah Overton Bonner
Assistant District Attorney
Kaufman County
100 West Mulberry Street
Kaufman, Texas 75142

OR2022-04851

Dear Ms. Bonner:

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# 931084.

Kaufman County (the "county") received a request for several categories of records and communications involving county employees and officials and certain types of allegations.¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See* Attorney General Opinion JM-119 (1983) (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body is not acting as a member of the public in doing so. *Id.* Thus, exceptions to public disclosure under the Act do not control the official's right of access to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees,

¹ You state the county 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).

acting in official capacity, has an inherent right of access to information maintained by district).

In this instance, we note the requestor is a county commissioner. It is unclear whether the requestor is requesting the information in his personal capacity as a member of the public or in his official capacity as commissioner. Accordingly, we rule conditionally on this matter. Therefore, in the event the requestor is acting in his official capacity, we find the present request is not a request by a member of the public under the Act, and we determine that the county may not withhold the requested information from the requestor pursuant to the Act's exceptions to required public disclosure.² *See id.* However, in the event the requestor is making the present request in his personal capacity as a member of the public, we will address the argument against disclosure.

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 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

² We note the release of the requested information to this requestor, acting in his official capacity, would not constitute a release of the information to the general public, and the county would not waive any potential exceptions to disclosure of the information under the Act. *See* Open Records Decision No. 666 at 4 (2000) (municipality's disclosure to municipally-appointed citizen advisory board would not constitute release to public as contemplated under Gov't Code § 552.007).

S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the submitted information consists of communications between attorneys for the county and county employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the county. You further state these communications were intended to be confidential 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 submitted information. Thus, the county may withhold the submitted information under section 552.107(1) of the Government Code.

In summary, if the requestor is acting in his official capacity, then the present request is not a request by a member of the public under the Act, and the county may not withhold the requested information from the requestor pursuant to the Act's exceptions to required public disclosure. If the requestor is not acting in his official capacity, the county may withhold the submitted 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,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/jm

Ref: ID# 931084

c: Requestor