



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 22, 2022

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

OR2022-08259

Dear Ms. Harden:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. This request was originally received by the Open Records Division ("ORD") of this office and assigned ID #939657. Preparation of the ruling has been assigned to the Opinion Committee of this office.

According to materials you submit, the Office of the Attorney General (the "OAG") received a request for information pertaining to a specified telephone call. You assert that the submitted document is excepted from public disclosure under section 552.107(1) of the Government Code. We have considered the exception you claim and reviewed the information you submitted under the tab marked "Exhibit B."

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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. *See* Tex. Att'y Gen. ORD 676 (2002) at 6–7. 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. *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) (attorney-client privilege does not

apply if attorney acting in 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)–(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.*, 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding [mand. denied]). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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) (privilege extends to “entire communication, including facts contained therein”).

You state that the requestor “submitted a complaint to the Enforcement Section of the Open Records Division” and that “[d]uring the complaint process, the requestor spoke to an enforcement attorney who took notes during the conversation.” You further state that “[t]he notes were written and shared with other enforcement staff for the sole purpose of resolving the complaint.” You explain that “[t]he notes were not intended to be disclosed and have not been disclosed to non-privileged parties.” You assert that “the notes are a confidential communication between privileged parties that were made for the purpose of providing professional legal services to the OAG” and do not indicate that you have waived the confidentiality of the information at issue.

Based on your representations and our review, we find that the responsive information submitted in the tab marked “Exhibit B” constitutes an attorney-client communication made in furtherance of the rendition of legal services to the OAG. Therefore, we conclude that the OAG may withhold the document in its entirety 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,

Christy Drake-Adams
Assistant Attorney General
Opinion Committee

CDA/eb

Ref: ID# 939657

Enc. Submitted documents

c: Requestor
(w/o enclosures)