



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 9, 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

OR2022-13237

Dear Ms. Harden:

Public Information Act (“PIA”), chapter 552 of the Government Code. This request was originally received by the Open Records Division (“ORD”) of this office and assigned ID# 946613. Preparation of the ruling has been assigned to the Opinion Committee of this office.

You attached a copy of the request marked as Exhibit A. The requestor seeks all records and documents pertaining to a previous public information request. You assert that the responsive information is excepted from required public disclosure under the PIA. You have submitted a representative sample of the information as Exhibit B. You seek a decision whether section 552.107 of the Government Code excepts the submitted information from required public disclosure. We have considered the exception you claim and reviewed the representative sample information you submitted as Exhibit B.¹

Section 552.107(1) excepts from disclosure “information that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” 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

¹We assume the “representative sample” of records submitted for review is truly representative of the requested records as a whole. 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. *See* TEX. GOV’T CODE §§ 552.301(e)(1)(D), .302; *Tex. Att’y Gen. ORD-499 (1988)* at 6, *ORD-497 (1988)* at 4.

governmental body must demonstrate that “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, such as acting as an administrator, investigator, or manager. *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”). 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, 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. *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 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) (stating that the privilege extends to an “entire communication, including facts contained therein”).

You state that the information submitted as Exhibit B consists of or reveals communications between ORD attorneys and staff regarding a specific ORD enforcement matter. You also state that the information includes notes between ORD attorneys and staff and internal ORD tracking sheets. You explain that the tracking sheets are part of the communications between ORD attorneys and are used in the process of drafting, reviewing, editing, and revising draft letters and rulings before their issuance in final form. You state that the tracking sheets are circulated with the drafts and are used by the ORD attorneys to communicate their legal advice and opinions. You further state that the communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Based on your representations and our review, we find the documents in Exhibit B constitute or reveal confidential communications between privileged parties that were made for the purposes of providing professional legal services to the OAG. Because we conclude that this representative sample information is subject to the attorney-client privilege, the information at issue may be withheld under section 552.107 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,

William A. Hill
Assistant Attorney General
Opinions Committee

WAH/eb

Ref: ID# 946613

Enc. Submitted documents

c: Requestor
(w/o enclosures)