



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 31, 2022

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

OR2022-15586

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. Your request was assigned ID# 950801 (PIR No. R011938).

The Office of the Attorney General (the "OAG") received a request for any information pertaining to a specified type of investigation involving a named entity during a stated month. The OAG states it will release some information with redactions allowed by law. The OAG claims portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 17.61(f) of the Business and Commerce Code, which provides, in relevant part, the following:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be

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<sup>1</sup> We 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.

produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the [OAG] without the consent of the person who produced the material. The [OAG] shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

Bus. & Com. Code § 17.61(f). This provision requires the OAG to withhold from required public disclosure all documentary material the OAG obtained pursuant to a Civil Investigative Demand (“CID”). The OAG explains its Consumer Protection Division (“CPD”) issued a CID to the company at issue, which complied with the CID by submitting the information in Exhibit B to the OAG. Thus, we agree the OAG must withhold the information it marked in Exhibit B under section 552.101 because it is information obtained pursuant to a CID and, therefore, is confidential under section 17.61(f).

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 OAG states Exhibit C consists of communications between attorneys and staff of the CPD that pertain to certain investigative and enforcement matters of the CPD. The OAG explains these communications were made for the purpose of providing professional legal services to the OAG, and these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Based upon these representations and our review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the OAG may withhold Exhibit C under section 552.107(1) of the Government Code.

In summary, the OAG must withhold the information it marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code. The OAG may withhold Exhibit C under section 552.107(1) of the Government Code. The OAG must release the remaining information in Exhibit B.

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,

James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/be

Ref: ID# 950801

Enc. Submitted documents

c: Requestor  
(w/o enclosures)