



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 7, 2022

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

OR2022-16331

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# 949627 (PIR Nos. R011876, R011888, and R012081).

The Office of the Attorney General (the "OAG") received three requests from two requestors for information pertaining to the investigation of a named entity. The OAG states it has or will release some information. 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.¹

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

¹ 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.

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).

The OAG states Exhibit D consists of internal communications between attorneys and staff of the OAG’s Financial Litigation and Charitable Trust Division (the “CTS”) regarding certain legal matters of the OAG. The OAG also states 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 the information at issue. Accordingly, the OAG may withhold Exhibit D under section 552.107(1) of the Government Code.

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. This section encompasses information that other statutes make confidential. Section 6103 of title 26 of the United States Code makes certain federal tax returns and tax return information confidential. *See* 26 U.S.C. § 6103(a); *see also id.* § 6103(b)(1)-(2) (defining “return” and “return information”). However, section 6104 of title 26 provides for the disclosure of tax returns in certain situations:

(d) Public inspection of certain annual returns[.]--

- (1) In general.--In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a)--

(A) a copy of--

(i) the annual return filed under section 6033 . . . by such organization,

...

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and . . .

(B) upon request of an individual made at such principal office . . . , a copy of such annual return . . . shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

...

(2) 3-year limitation on inspection of returns.--Paragraph (1) shall apply to an annual return filed under section 6011 or 6033 only during the 3-year period beginning on the last day prescribed for filing such return (determined with regard to any extension of time for filing).

Id. § 6104(d)(1)(A)(i), (d)(1)(B), (d)(2); *see* 26 C.F.R. § 301.6104(d)-1(a). Thus, a section 501(c) or (d) tax-exempt organization must generally make its annual returns available for public inspection for a period of three years from the last day prescribed for filing. The OAG explains Exhibit C consists of Forms 990 tax returns that were filed by a section 501(c) tax-exempt organization. The OAG informs us, and the information at issue reflects, the information at issue was filed more than three years prior to the date the OAG received the requests for information. Thus, the three-year inspection period has lapsed with regard to these returns, and the requestors do not have a right of inspection under section 6104. Accordingly, the submitted Forms 990, which the OAG submitted as Exhibit C, constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. Section 12.153 of the Business Organizations Code authorizes the OAG to “investigate the organization, conduct, and management of a filing entity . . . and determine if the entity has been or is engaged in acts or conduct in violation of: . . . (2) any law of this state.” Bus. Org. Code § 12.153. In order to examine the entity’s business, “the attorney general shall make a written request to a managerial official, who shall immediately permit the attorney general to inspect, examine, and make copies of the records of the entity.” *Id.*

§ 12.152. Information the OAG maintains and derives in the course of an examination of the entity's records is confidential. *Id.* § 12.154.

The OAG explains the information at issue relates to an examination conducted by the CTS authorized under section 12.153. The OAG states the information at issue was produced in response to a request to examine records made pursuant to section 12.152. The OAG also states none of the exceptions in section 12.154 apply in this instance. *See id.* Based upon these representations and our review, we find the information at issue is confidential under section 12.154, and the OAG must withhold the information it marked and indicated under section 552.101 on that basis.

In summary, the OAG may withhold Exhibit D under section 552.107(1) of the Government Code. The OAG must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The OAG must withhold the information it marked and indicated under section 552.101 of the Government Code in conjunction with section 12.154 of the Business Organizations Code. The OAG must release the remaining 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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/mo

Ref: ID# 949627

Enc. Submitted documents

c: Requestors
(w/o enclosures)