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ATTORNEY GENERAL OF TEXAS

September 9, 2022

Mr. Kieran Hillis
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2022-27670

Dear Mr. Hillis:

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# 968736 (OOG# 296-22).

The Office of the Governor (the "governor's office") received a request for specified communications during a certain time period.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.² In addition, you state release of some of the information at issue may implicate the interests of third parties. Accordingly, the governor's office states it notified these interested parties of the request for information and of the right to submit arguments to this office. *See* Gov't Code §§ 552.304, .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in the Act in certain

¹ We note the governor's office 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² We note, and you acknowledge, the governor's office failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977). Further, because sections 552.101 and 552.107 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider whether the submitted information is excepted from disclosure under the Act, notwithstanding the violation of section 552.301 in requesting this decision. *See id.* § 552.302; *see also* *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017).

circumstances). We have received comments from the Texas Department of Public Safety (“DPS”). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

We note portions of the submitted information, which we have marked, were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2022-24772 (2022), 2022-25386 (2022), 2022-25387 (2022), and 2022-25605 (2022). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the governor’s office must continue to rely on Open Records Letter Nos. 2022-24772, 2022-25386, 2022-25387, and 2022-25605 as previous determinations and withhold or release the requested information in accordance with those rulings.⁴ *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).

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

³ 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 those records contain substantially different types of information than that submitted to this office.

⁴ As we are able to make this determination, we need not address the arguments against disclosure of this information.

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).

You state the information at issue consists of communications between the attorneys for the governor's office, governor's office officials and staff. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the governor's office. 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 information at issue. Thus, the governor's office may withhold the information it marked under section 552.107(1) of the Government Code.

In summary, the governor's office must continue to rely on Open Records Letter Nos. 2022-24772, 2022-25386, 2022-25387, and 2022-25605 as previous determinations and withhold or release the information we have marked in accordance with those rulings. The governor's office may withhold the information it marked under section 552.107(1) of the Government Code. The governor's office 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,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/jm

Ref: ID# 968736

Encl. Submitted Documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)