



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-30027

Dear Ms. Bell:

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# 976700.

The Tarrant County District Attorney's Office (the "district attorney's office") received a request for communications sent to or from the district attorney's office pertaining to two specified public information requests. You claim some of the submitted information was the subject of a previous ruling by this office. You claim the remaining information is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you inform us the information you indicated was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2022-20935 (2022). In that ruling, we concluded the district attorney's office may withhold the information at issue under section 552.108(a)(1) of the Government Code on behalf of the United States Department of Justice. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the district attorney's office may continue to rely on Open Records Letter No. 2022-20935 as a previous determination and withhold the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.107(1) of the Government Code protects information subject to 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 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 assert the remaining information, which consists of e-mails, constitutes communications between district attorney’s office attorneys and employees of the district attorney’s office that were made for the purpose of providing legal advice to the district attorney’s office. You also assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Thus, the district attorney’s office may generally withhold the remaining information under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings at issue include e-mails received from the requestor, who is a non-privileged party. Furthermore, if the e-mails received from the requestor are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails received from the requestor are maintained by the district attorney’s office separate and apart from the otherwise privileged e-mail strings in which they appear, then the district attorney’s office may not withhold the

e-mails received from the requestor under section 552.107(1) of the Government Code. In that instance, the non-privileged e-mails received from the requestor must be released.

In summary, as we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the district attorney's office may continue to rely on Open Records Letter No. 2022-20935 as a previous determination and withhold the previously ruled upon information in accordance with that ruling. The district attorney's office may generally withhold the remaining information under section 552.107(1) of the Government Code; however, if the non-privileged e-mails received from the requestor are maintained by the district attorney's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the district attorney's office must release the e-mails received from the requestor.

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,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/pt

Ref: ID# 976700

Enc. Submitted documents

c: Requestor
(w/o enclosures)