



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2013

Ms. Patsy Spaw
Secretary of the Senate
The Senate of the State of Texas
P.O. Box 12068
Austin, Texas 78711

OR2013-15787

Dear Ms. Spaw:

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# 499952.

The Texas Senate (the "senate") received a request for all communications sent or received by all state senators or their staff regarding the Texas Legislature Online website or official timekeeping on three specified dates at the end of the 83rd Legislature, First Called Session. You state you have released some responsive information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you submitted in response to the request was not communicated on any of the three dates specified in the request. This information, which we have marked, is not responsive to the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990). Our ruling does not address the public availability of information that is not responsive to a request, and the senate is not required to release non-responsive information.

Section 552.107(1) of the Government Code protects information that comes 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. *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 “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* 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. *See 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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).

You state the information you have numbered 3 and 4 constitutes communications between a senator’s general counsel and members of the senator’s staff. You further state the information you have numbered 7 constitutes the draft text of a proposed statement written by the senator’s general counsel at the request of the senator. You assert these communications were made in furtherance of the rendition of professional legal services to the senator. You state these communications were confidential, and the confidentiality of the information at issue has not been waived. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the

information you have indicated. Accordingly, the senate may withhold the information numbered 3, 4, and 7 under section 552.107(1) of the Government Code.¹

Section 552.106(a) of the Government Code excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

You explain the remaining information consists of text messages and e-mails exchanged between named senators and their staff and the handwritten notes and a draft typed statement of a named senator. You state this information was exchanged directly and entirely in connection with the procedural posture, chance of passage, and possible investigation of the vote on a specified piece of proposed legislation. Upon review, we find the remaining responsive information constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, the senate may withhold this information under section 552.106 of the Government Code.²

In summary, the senate may withhold the information numbered 3, 4, and 7 under section 552.107(1) of the Government Code. The senate may withhold the remaining responsive information under section 552.106 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.

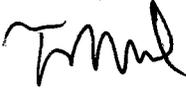
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open_orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Neal". The signature is stylized with a large initial "T" and a cursive "Neal".

Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 499952

Enc. Submitted documents

c: Requestor
(w/o enclosures)