



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 16, 2013

Mr. Randall Miller  
Assistant Criminal District Attorney  
Civil Division  
Dallas County  
411 Elm Street, 5<sup>th</sup> Floor  
Dallas, Texas 75202-3317

OR2013-16049

Dear Mr. Miller:

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# 499528.

The Dallas County Commissioner's Court (the "commissioner's court") received a request for nine categories of information pertaining to a specified position from a specified time period. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor contends the commissioner's court has not released some of the requested information. You inform us the commissioner's court has released or will release some of this information. Whether the commissioner's court actually provided the information at issue to the requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon

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<sup>1</sup>Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

those facts that are discernible from the documents submitted for our inspection. ORD 552 at 4. Thus, we assume the commissioner's court has released to the requestor any responsive information for which the commissioner's court is not claiming an exception. If not, the commissioner's court must do so at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.107(1) of the Government Code protects information that comes 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 ORD 676 at 6-7. 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 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, 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 explain the submitted information consists of communications between attorneys with the Dallas County District Attorney's Office (the "district attorney's office") and members of the commissioner's court and employees of the County of Dallas (the "county") in their capacities as clients. You inform us these communications were made in furtherance of the rendition of professional legal services to the clients. You also inform us the

communications were intended to be confidential and their confidentiality has been maintained. The requestor asserts the attorneys at issue were not acting as legal counsel for the commissioner's court or the county when the communications were made. The requestor also contends the attorney-client privilege has been waived because the commissioner's court and the county provided information to a non-privileged party. The questions of whether the attorneys at issue were acting in their capacity as attorneys, and whether or not the commissioner's court or the county waived the attorney-client privilege, are questions of fact. As noted above, this office cannot resolve disputes of fact in its decisional process. *See* ORDs 592 at 2, 552 at 4, 435 at 4. As previously noted, where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. ORD 552 at 4. In this instance, you represent the submitted information consists of communications between attorneys with the district attorney's office and members of the commissioner's court and employees of the county in their capacities as clients. You also represent these communications were made in furtherance of the rendition of professional legal services to the clients. Further, you represent the communications were intended to be confidential and their confidentiality has been maintained. Therefore, based on your representations and our review of the submitted information, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the commissioner's court may withhold the submitted information under section 552.107(1) of the Government Code.<sup>2</sup>

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

Sincerely,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/bhf

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

Mr. Randall Miller - Page 4

Ref: ID# 499528

Enc. Submitted documents

c: Requestor  
(w/o enclosures)