



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2013

Mr. Jeff Archer
Chief Legislative Counsel
Texas Legislative Council
P.O. Box 12128
Austin, Texas 78711-2128

OR2013-20686

Dear Mr. Archer:

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# 507383.

The Select Committee on Transparency in State Agency Operations of the House of Representatives (the "committee"), which you represent, received a request for a specified list of potential witnesses. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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 "for the purpose of facilitating 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

¹This decision does not address your claim under Texas Rule of Evidence 503, which you initially asserted but have since withdrawn.

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)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 state the submitted information relates to an investigation being conducted by the committee. You state the submitted information consists of a list of potential witnesses that was prepared for, and disseminated to, the committee by the attorney for the committee to facilitate the rendition of professional legal services to the committee. You inform us the submitted information was intended to be confidential and has remained confidential. Based on your representations and our review, we conclude you have established the submitted information is protected by the attorney-client privilege, and thus, it is excepted from disclosure under section 552.107(1) of the Government Code.

The requestor, however, argues the submitted information is not protected by the attorney-client privilege because the information would be required to be given to the opposing party in a judicial proceeding under rule 194.2(e) of the Texas Rules of Civil Procedure. Rule 194.2(e) allows a party to litigation to request disclosure of “the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case” during the discovery process. TEX. R. CIV. P. 194.2(e). We note, however, that discovery procedures and requests made under the Act are two disparate processes. *See Attorney General Opinion JM-1048* at 3 (1989) (stating that the fundamental purposes of the Act and of civil discovery provisions differ); *Open Records Decision No. 551* (1990) at 3-4 (discussion of relation of Act to discovery process). The Act differs in purpose from statutes and procedural rules providing for discovery in

judicial proceedings. *See* Gov't Code §§ 552.0055 (subpoena duces tecum or request for discovery issued in compliance with statute or rule of civil or criminal procedure is not considered to be request for information under the Act), .006 (chapter 552 does not authorize withholding of public information or limit the availability of public information to the public, except as expressly provided by chapter 552). The discovery process is a process through which parties to litigation can obtain information pertaining to the litigation. A public information request under the Act is a process in which any individual may request information from a governmental body. Thus, the discovery process has no bearing on the availability of information requested under Act. Accordingly, the committee may withhold the submitted information under section 552.107(1) of the Government Code.²

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

Sincerely,


Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/dls

Ref: ID# 507383

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address your remaining arguments disclosure.