



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2014

Mr. David F. Brown
Counsel for Texas Windstorm Insurance Association
Ewell, Brown & Blanke, L.L.P.
111 Congress Avenue, 28th Floor
Austin, Texas 78701

OR2014-11344

Dear Mr. Brown:

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# 528489 (TWIA ID# 000228).

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for summary commission reports listing the total amount of commission per year paid to a named insurance agent during a specified time period, and communications to or from four named individuals during a specified time period.¹ You state the association has released some information to the requestor and will release additional information to the requestor. You claim the submitted information is excepted from disclosure under

¹You state the association sought and received clarification of the information requested. See Gov't Code § 552.222 (providing that 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You also inform us the requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code, which the association received on April 18, 2014. See Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

sections 552.107, 552.111, and 552.136 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you state the association previously provided the submitted information to a state senator's office pursuant to section 552.008 of the Government Code. Section 552.008(b) provides, in part, as follows:

[A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with [the Act] if the requesting member, agency, or committee states that the public information is requested under [the Act] for legislative purposes.

Gov't Code § 552.008(b). We note that disclosure of excepted or confidential information to a legislator under section 552.008 does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information, and section 552.008 provides specific procedures relating to the confidential treatment of the information. *Id.* Accordingly, we will address the association's argument against disclosure of the submitted information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See id.* § 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* 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

²Although you also raise section 552.103 of the Government Code, you have provided no arguments in support of that exception. Accordingly, we assume you no longer assert that exception. *See* Gov't Code §§ 552.301, .302. Additionally, although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and attorney work product privilege for information not subject to section 552.022 of the Government Code are section 552.107 of the Government Code and section 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2, 6 (2002).

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

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. Finally, the attorney-client privilege applies only to a confidential communication, 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. 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 e-mails and attachments you have marked consist of attorney-client privileged communications between the Texas Department of Insurance (“TDI”), TDI’s representatives, the association, the association’s representatives, and the association’s outside counsel. You state pursuant to section 441.053 of the Insurance Code, TDI has administrative oversight of the association. See Ins. Code § 441.053(a) (commissioner can place insurer under supervision if necessary due to insurer’s insolvency, exceeding of powers, or failure to comply with law). You explain this relationship places TDI in the role of supervisor over the association, which includes requiring TDI to participate in litigation-related discussions with the association and the association’s counsel so TDI could approve expenditures for legal counsel or settlements. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the association and were intended to be and have remained confidential. You also state the association provided the information at issue to a state senator’s office pursuant to section 552.008 of the Government Code. As noted above, the disclosure of the information at issue to the state senator’s office under section 552.008 does not waive or affect the confidentiality of the information. Therefore, based on your representations and our review of the information at issue, we find the association has established the applicability of the attorney-client communication to the information at issue, and the association may generally withhold it

under section 552.107(1) of the Government Code.⁴ However, we note one of the e-mail strings at issue includes communications between the association and a representative of the state senator's office in which the association is not providing information requested pursuant to section 552.008 of the Government Code, and you have not established the representative of the state senator's office is a privileged party to the communications at issue. Furthermore, if these e-mails are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if the association maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail string in which they appear, then the association may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁵ Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked the cellular telephone number of a representative of the state senator's office under section 552.117(a)(1). We note this office has applied the interagency transfer doctrine to conclude information made confidential under section 552.117(a)(1) of the Government Code remains confidential upon transfer to another governmental body. *See* Open Records Decision No. 674 at 4-5 (2001); *see also* Open Records Decision No. 516 (1989) (Department of Public Safety did not violate confidentiality under predecessor of section 552.117(2) by transferring police officer's home address to Attorney General's Child Support Enforcement Office). If the individual at issue timely requested confidentiality under section 552.024 and the cellular telephone service is not paid for by a

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

governmental body, the information at issue in the custody of the senator's office was confidential under section 552.117(a)(1). Pursuant to the intergovernmental transfer doctrine, the information remains confidential upon the transfer of this information to the association. Thus, in order to ascertain whether the personal information of the individual at issue is confidential and cannot lawfully be released to the public, the association must inquire with the senator's office as to whether the individual elected under section 552.024 to keep confidential her personal information and the cellular telephone service is not paid for by a governmental body. If so, then the association must withhold the information pertaining to that individual, which we have marked, under section 552.117(a)(1) of the Government Code.

In summary, the association may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the association maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail string in which they appear, then the association may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The association must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if, after inquiring with the senator's office, the association determines the individual timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body. The association 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 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/tch

Ref: ID# 528489

Enc. Submitted documents

c: Requestor
(w/o enclosures)