



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 23, 2014

Mr. James G. Nolan  
Associate Deputy General Counsel  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2014-12777

Dear Mr. Nolan:

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# 531164 (Comptroller ID# 10332471149).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for public information requests received from agents of or persons associated with certain organizations or from certain addresses, as well as any correspondence pertaining to these requests including all information sent to the requestors. You state the comptroller's office no longer maintains some of the responsive information.<sup>1</sup> You also state the comptroller's office has released some of the responsive information. You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

You claim some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We 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.

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 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.* 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, 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 state the information you have marked under section 552.107 consists of communications between comptroller’s office attorneys and staff to facilitate the rendition of professional legal services to the comptroller’s office. You also inform us these communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find you have established the applicability of the attorney-client privilege to the information you have marked. Accordingly, the comptroller’s office may generally withhold the information you have marked under section 552.107 of the Government Code. However, we note an e-mail within an otherwise privileged e-mail string is a communication with a non-privileged party. To the extent this non-privileged e-mail, which we have marked, exists separate and apart from the privileged e-mail string in which it appears, the comptroller’s office may not withhold it under section 552.107(1) of the Government Code.

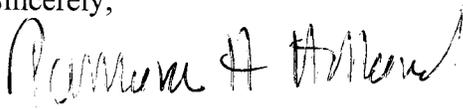
The non-privileged communication and the remaining submitted information contain the e-mail address of a member of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The address you have marked does not appear to be of a type specifically excluded by section 552.137(c). You inform us the owner of the e-mail address you have marked has not consented to its release. Accordingly, the comptroller’s office must withhold the e-mail address you have marked under section 552.137. *See id.* § 552.137(b).

In summary, the comptroller’s office may withhold the information you have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mail we have marked exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1) of the Government Code. The comptroller’s office must withhold the e-mail address you have marked under section 552.137 of the Government Code. The comptroller’s office must release the remaining information.<sup>3</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,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

THH/ac

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument.

Ref: ID# 531164

Enc. Submitted documents

c: Requestor  
(w/o enclosures)