



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2014

Mr. Chris Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2014-16180

Dear Mr. Sterner:

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# 537524 (OOG ID# 188-14).

The Office of the Governor (the "governor's office") received a request for communications between the governor's office and the Office of the Attorney General ("OAG") or five specified companies regarding the companies' repayment of funds received under the Texas Emerging Technology Fund ("ETF") or the ceased operations of the five specified companies.¹ You state the governor's office is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101

¹You state the governor's office sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. 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 to only 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. 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 to only 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. *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).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

You state the information you have marked constitutes a communication between governor's office staff and attorneys and OAG attorneys representing the governor's office that was made for the purpose of providing legal services to the governor's office. You state the communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find the information you have marked consists of a privileged attorney-client communication the governor's office may withhold under section 552.107(1) of the Government Code.³

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 490.057 of the Government Code addresses the confidentiality of certain information pertaining to the ETF. *See id.* § 490.057. *See generally id.* §§ 490.101-103. Section 490.057 provides:

(a) Except as provided by Subsection (b), information collected by the governor's office, the [Texas Emerging Technology Advisory Committee (the "committee")], or the committee's advisory panels concerning the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an individual or entity being considered for, receiving, or having received an award from the fund is confidential unless the individual or entity consents to disclosure of the information.

(b) The following information collected by the governor's office, the committee, or the committee's advisory panels under this chapter is public information and may be disclosed under [the Act]:

- (1) the name and address of an individual or entity receiving or having received an award from the fund;
- (2) the amount of funding received by an award recipient;
- (3) a brief description of the project that is funded under this chapter;
- (4) if applicable, a brief description of the equity position that the governor, on behalf of the state, has taken in an entity that has received an award from the fund; and

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(5) any other information designated by the committee with the consent of:

- (A) the individual or entity receiving or having received an award from the fund, as applicable;
- (B) the governor;
- (C) the lieutenant governor; and
- (D) the speaker of the house of representatives.

Id. § 490.057. You state the information at issue was collected by the governor's office and concerns the identity, background, finances, or marketing plans of ETF awardees. Accordingly, you assert the information at issue is confidential under subsection 490.057(a) and must be withheld from release pursuant to section 552.101 of the Government Code. Additionally, you inform us the awardees at issue have not consented to release of their information. Based upon your representations and our review, we find the information at issue concerns the identity, background, finance, or marketing plans of ETF awardees. However, we note, and you acknowledge, that any information listed in subsection 490.057(b) of the Government Code is public information and must be released. Therefore, with the exception of information that is subject to public release under subsection 490.057(b), which you state the governor's office is releasing, we conclude the governor's office must withhold the remaining information under section 552.101 of the Government Code in conjunction with subsection 490.057(a).

In summary, the governor's office may withhold the information you have marked under section 552.107(1) of the Government Code. With the exception of the information subject to subsection 490.057(b) of the Government Code, which must be released, the governor's office must withhold the remaining information under section 552.101 of the Government Code in conjunction with subsection 490.057(a).

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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 537524

Enc. Submitted documents

c: Requestor
(w/o enclosures)