



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 17, 2016

Ms. Patricia M. Crawson
Legal Administrator
Open Records
Texas Military Department
P.O. Box 5218
Austin, Texas 78763-5218

OR2016-03824

Dear Ms. Crawson:

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# 598669.

The Texas Military Department (the "department") received a request for ten categories of information pertaining to alleged violations of recruiting policy.¹ You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. Additionally, the department states release of some of the requested information may implicate the interests of the United States Army Criminal Investigation Command ("CID"). Accordingly, the department states it notified the CID of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). The department informs this office CID asserts some of the information at issue consists of federal records not subject to the Act. We have considered the submitted claims and reviewed the submitted information.

¹We note the requestor has limited his request to exclude the names and personally identifiable information of military personnel.

CID contends some of the information submitted as Enclosure 3 is not subject to the Act. The Act is applicable only to “public information.” *See id.* §§ 552.002, .021. Section 552.002(a) defines “public information” as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *See id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). *But see* Open Records Decision No. 635 at 4 (1995) (Gov’t Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). You inform us some of Enclosure 3 consists of e-mails from CID pertaining to its criminal investigation. You state CID asserts “the records are federal and not subject to the [Act].” However, CID submitted no arguments to support its contention. We further note the information in question consists of portions of an e-mail string between CID and the department regarding the investigation. Accordingly, we find the information at issue consists of information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by the department. Thus, the information at issue is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act.

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 “to facilitate 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)(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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 some of the submitted information relates to discussions between department attorneys and department staff made for the purpose of facilitating the rendition of legal services. You also indicate these communications were intended to be confidential and that the confidentiality has been maintained. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to some of the submitted information. Thus, the department may withhold the information it marked under section 552.107(1) of the Government Code. The department must release the remaining responsive information.²

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

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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 598669

Enc. Submitted documents

c: Requestor
(w/o enclosures)

U.S. Army Crime Records Center
ATTN: CICR-FP
Russell Knox Building
27130 Telegraph Road
Quantico, Virginia 22134-2253
(w/o enclosures)