



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 15, 2016

Ms. Sylvia Hardman-Dingle
General Counsel
Texas Department of Assistive and Rehabilitative Services
4800 North Lamar Boulevard, Suite 300
Austin, Texas 78756

OR2016-18390

Dear Ms. Hardman-Dingle:

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# 623049 (PIA# 2016-06/01-1).

The Texas Department of Assistive and Rehabilitative Services ("DARS") received a request for information regarding an open complaint involving the requestor and the requestor's company. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ 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. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to

¹Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

²We 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.

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 “to facilitate 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 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, and lawyer representatives. *See* 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. Finally, 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. *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 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 consists of communications involving attorneys for DARS and DARS employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to DARS and these communications have remained confidential. Upon review, we find DARS has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, DARS may withhold the information you have marked under section 552.107(1) of the Government Code.³

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t

³As our ruling is dispositive, we do not address your other argument to withhold this information.

Code § 552.101. This section encompasses information protected by other statutes. The purpose of chapter 111 of the Human Resources Code is to provide rehabilitation and related services to eligible individuals with disabilities so they may prepare for and engage in a gainful occupation or achieve maximum personal independence. *See* Hum. Res. Code § 111.001. Section 111.018(b) of the Human Resources Code reads as follows:

In carrying out his or her duties under this chapter and Subchapter F, Chapter 117, the commissioner [of DARS] shall, with the approval of the executive commission, implement policies addressing . . . the protection of records and confidential information . . . and other regulations relating to this chapter or Subchapter F, Chapter 117, as necessary to carry out the purposes of this chapter and Subchapter F, Chapter 117.⁴

Id. § 111.018(b). Under the authority of section 111.018(b), DARS promulgated section 101.809 of title 40 of the Texas Administrative Code, which reads as follows:

(a) Consumer records.

(1) All personal information available to DARS employees as they administer rehabilitation services programs, including names, addresses, and records of consumer evaluations, is confidential.

(2) DARS may use such information and records only for purposes directly connected with administering the rehabilitation programs.

(3) DARS may directly or indirectly disclose information only in administering the rehabilitation programs, except with the consumer's written consent, in compliance with a court order, or in accordance with a federal or state law or regulation. DARS may not share information containing identifiable personal information with advisory or other bodies that do not have official responsibilities for administration of the programs.

(4) Upon a consumer's request, DARS releases information to a consumer or, as appropriate, his parent, guardian, or other representative. If, in the opinion of the counselor, release to the consumer of a particular document in the consumer case file will have a harmful effect on the consumer, the consumer will be notified that

⁴The 78th Legislature transferred all powers, duties, functions, programs, and activities of the former Texas Rehabilitation Commission to DARS effective March 1, 2004. *See* Act of June 1, 2003, 78th Leg., R.S., ch. 198, §§ 1.01, 1.21, 1.26, 2003 Tex. Gen. Laws 611, 612, 641.

there is information in the case file that can be released only to an appropriate representative designated in writing by the consumer.

(5) All consumer information is the property of DARS.

(b) Other records.

(1) Release of consumer records must be made in accordance with federal law and regulations.

(2) DARS may provide to and receive from any state agency other nonconfidential information for the purpose of increasing and enhancing services to consumers and improving agency operations.

40 T.A.C. § 101.809; *see also* 29 U.S.C. § 721(a)(10)(F) (discussing confidentiality of identities of applicants and eligible individuals under federal Rehabilitation Act of 1973 and its amendments, 29 U.S.C. §§ 701-751); 34 C.F.R. § 361.38(a)(1) (same). You represent some of the remaining information consists of personal information pertaining to a consumer of a rehabilitation services program. *See* 40 T.A.C. § 101.809(a)(1). You state the requestor has not provided a release from the consumer whose information is at issue, established she will use this information in a vocational rehabilitation program, or demonstrated any other exceptions allowing disclosure apply. Therefore, we agree DARS must withhold the remaining information you have marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 111.018(b) of the Human Resources Code and section 101.809 of title 40 of the Texas Administrative Code.

We note the remaining information contains information subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.⁵ *See* Gov't Code § 552.130(a). DARS must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, with the exception of the information we have marked for release, DARS may withhold the information you have marked under section 552.107(1) of the Government Code. DARS must withhold the remaining information you have marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 111.018(b) of the Human Resources Code and section 101.809 of title 40 of the

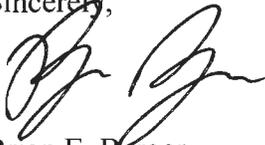
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Texas Administrative Code. DARS must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 623049

Enc. Submitted documents

c: Requestor
(w/o enclosures)