

Pursuant to section 552.308(b), this is to confirm the brief at issue was timely placed in intra-agency mail addressed to the Open Records Division on November 3, 2020.



Lauren Downey
Assistant Attorney General
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KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2020

Justin Gordon
Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Re: Public Information Request No. R007038

Dear Mr. Gordon:

On October 26, 2020, the Office of the Attorney General ("OAG") received a public information request under the Public Information Act ("PIA"), Chapter 552, Government Code, from Mr. John McMillan. A copy of the request is attached as Exhibit A.

The OAG will release most of the responsive information with redactions allowed by law. *See* Open Records Decision No. 684 (2009) (governmental bodies may withhold certain information, including personal e-mail addresses, without necessity of requesting ruling under Gov't Code § 552.301). The OAG asserts, however, that the remaining information responsive to this request is excepted from required public disclosure under the PIA. Pursuant to sections 552.301(b) and 552.301(e) of the Government Code, this brief is submitted to seek a decision as to whether section 552.107 of the Government Code applies to the remaining information. We have copied the requestor as a recipient of this brief pursuant to sections 552.301(d) and 552.301(e-1) of the Government Code. The information at issue is attached as Exhibit B.

**I. Information Excepted From Required Public Disclosure Under Section 552.107:
Privileged Attorney-Client Communications**

Section 552.107(1) of the Government Code excepts from required public disclosure information "that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Gov't Code § 552.107. Section 552.107 protects information that falls 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *Id.* 503(b)(1)(A), (B), (C), (D), (E). 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).

Section 552.107(1) applies to communications between a governmental body and its attorney made in confidence to further the attorney's rendering of professional legal services to the governmental body. Attorney General opinions applying section 552.107(1) have permitted governmental bodies to withhold information their attorneys have received or generated in the capacity of a legal advisor. *See* Open Records Decision No. 462 at 10-11 (1987) (applying section 3(a)(7), predecessor to Section 552.107(1)). Your office has previously ruled Open Records Division ("ORD") internal tracking sheets are excepted from disclosure under section 552.107(1). *See* Open Records Letter No. 2012-03344 (2012).

Exhibit B is an internal tracking sheet of ORD. Tracking sheets are part of the communications between ORD attorneys and are used in the process of drafting, reviewing, editing, and revising draft letters and rulings before their issuance in final form. The tracking sheets are circulated with the drafts and are used by ORD attorneys to communicate their legal advice and opinions. Exhibit B was not intended to be disclosed and has not been disclosed to non-privileged parties. *See* Tex. R. Evid. 503(a)(5). Because the document in Exhibit B reveals confidential communications between privileged parties that were made for the purpose of providing professional legal services to the agency, the OAG asserts the exhibit may be withheld in its entirety under section 552.107(1) of the Government Code.

II. Conclusion

The OAG respectfully requests a decision from the Open Records Division regarding the applicability of the argued exception as provided by the PIA.

Please do not hesitate to contact me if you have questions or require additional information.

Sincerely,



June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General

cc: Mr. John McMillan
8805 North Plaza Dr., Apt. 2418
Austin, TX 78753
(w/o enclosures)