



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 21, 2022

Ms. Jackie Wood
Director of Public Integrity and Complex Crimes
Travis County District Attorney's Office
Jackie.Wood@traviscountytexas.gov

VIA HAND DELIVERY

Re: Open Records Complaint from Maria Reeve, Karisa King, Marc Duvoisin, Steve Coffman, and Manuel Garcia

Dear Ms. Wood:

On January 13, 2022, the Travis County District Attorney's Office ("TCDAO") notified our office of a complaint jointly submitted by a group of newspaper editors alleging that Attorney General Ken Paxton and the Office of the Attorney General ("OAG") failed to comply with the Texas Public Information Act ("PIA"). You further informed us that your office has determined, based solely on these complaints and without conferring with the OAG in any manner, that three allegations in particular amount to violations of unspecified provisions of the PIA.

Initially, we observe that your letter makes conclusory statements that "[w]e have determined that a violation of chapter 552 of the Texas Government Code has occurred" without referencing any specific provision of the PIA other than the section that vests your office with authority to seek declaratory and injunctive relief. In any event, complainants' allegations are meritless and present no violations of the PIA to cure. In each instance, complainants' allegations rely on unsupported assumptions and fundamental misunderstandings of the PIA and its requirements. Frustrated that they have failed to uncover anything worth reporting following "numerous open records requests to AG Paxton office for various documents," complainant newspaper editors have sought to leverage your office's authority to further their fishing expedition, or worse, manufacture a conflict between our respective offices that will give rise to publishable content for the complainants' media outlets.

Based on the complainants' awareness of a small number of inconsequential documents they believe should have been produced in PIA requests made upon Attorney General Paxton, they baselessly speculate that Attorney General Paxton is failing to comply with his obligations under the PIA. These documents include an unsolicited text message sent by a reporter to Attorney General Paxton's personal cell phone and a grand total of three emails on which Attorney

General Paxton was copied—two “spam” emails sent from an external user and an internal email announcing the temporary closure of an OAG parking garage. Additionally, complainants argue that a text message exchange that Attorney General Paxton *did* produce between himself and another state official concerning dinner plans and appropriate attire for an event suggests, without evidence, that Attorney General Paxton withheld other similar text messages.

The assumption underlying complainants’ allegations is that Attorney General Paxton was required to maintain custody of these insignificant communications from the time he received them until the time he received the PIA requests at issue. Without conceding that any of these documents constitute public information, we note that the PIA does not require state employees or officials to retain *all* public information indefinitely. Under the OAG records retention policy, neither OAG employees nor the Attorney General himself are required to maintain “transitory information.”¹ All of the innocuous and nonsubstantive communications the complainants cite as evidence that the OAG and Attorney General Paxton violated the PIA are transitory in nature, assuming they are public information at all. Transitory information may be disposed of once the purpose of the record has been fulfilled, and in each instance Attorney General Paxton was not obligated to remain in possession of the information at issue at the time it was requested.

Complainants have allowed their unwarranted assumptions to fuel speculation that Attorney General Paxton and the OAG are not fully complying with the PIA. Nothing could be further from the truth. Moreover, the PIA does not obligate custodians of public information to explain why public information does or does not exist—it only imposes an obligation to identify and produce, where required, responsive public information upon a proper request. Attorney General Paxton and the OAG have fulfilled that obligation.

Further information concerning each allegation is provided below.

Allegation Number One: Complainants believe General Paxton is improperly withholding his communications as attorney-client privileged documents.

OAG response: The OAG and Attorney General Paxton have fully complied with both PIA requests at issue in this complaint. Mr. Tedesco has been provided all non-privileged documents responsive to his request.

On January 13, 2021, reporter John Tedesco requested “[a]ll work-related emails and electronic messages sent to or from accounts or messaging apps belonging to Attorney General Ken Paxton. Such services include, but are not limited to, Signal, Slack, WhatsApp, Facebook

¹ The OAG’s Records Retention Schedule defines “transitory information” as “[r]ecords of temporary usefulness that are not an integral part of a record series of an agency, that are not regularly filed within an agency’s recordkeeping system, and that are required only for a limited period of time for the completion of an action by an official or employee of the agency or in the preparation of an ongoing record series.” These records, which are “not essential to the fulfillment of statutory obligations or to the documentation of agency functions,” include, among others, “routine information used for communication, but not for the documentation, of a specific agency transaction.” See Office of the Attorney General Records Retention Schedule, 10th Recertification, p. 19, attached as Exhibit A. This policy was approved by the Texas State Library and Archives Commission on June 17, 2020. See *id.* at cover page; see also 13 Tex. Admin. Code § 6.1–10 (providing for review and certification of a state agency records retention schedule).

Messenger, texting apps and email apps on any type of device. Please include messages sent to or from all work accounts and services and all personal accounts and services that contain work-related material. The time frame for this request is from Jan. 5, 2021, to the present.”

Our office sought a ruling from the Open Records Division, asserting the responsive communications were privileged attorney-client communications pursuant to Government Code section 552.107. On April 9, 2021, the Open Records Division issued Open Records Letter Ruling No. 2021-09095 (2021), which held the responsive documents may be withheld on the basis of the attorney-client privilege.²

This complaint has brought to our attention that our office later released three non-privileged communications on which Attorney General Paxton was copied in response to a related request, also from John Tedesco, made to First Assistant Attorney General Brent Webster a few days later. These three documents include two emails from an external sender that can be fairly characterized as unsolicited “spam” and an internal email about a temporary closure of an OAG parking garage. Assuming without conceding that these emails constitute public information, they are classified as transitory information under OAG records retention policy and may be permissibly disposed of once the purpose of the record has been fulfilled. Although First Assistant Webster maintained these emails, Attorney General Paxton had no non-privileged communications responsive to this request at the time the request was made. Accordingly, Mr. Tedesco has already been provided with all non-privileged documents responsive to this request—there is nothing more to provide. Neither the complainants nor your letter cites any other evidence that Attorney General Paxton or the OAG have not fully complied with the PIA.

There is no violation to cure.

Allegation Number Two: Complainants believe General Paxton is failing to retain and turn over communications related to official business maintained on his personal devices.

OAG response: The OAG and Attorney General Paxton have fully complied with the PIA requests at issue in this complaint. Attorney General Paxton was not obligated by law or policy to maintain the unsolicited text message sent to his personal cellular phone and maintained no documents responsive to this request at the time it was made.

On February 22, 2021, the OAG received a request from reporter Lauren McGaughy for “[a]ny and all communications, including text messages, that Texas Attorney General Ken Paxton received via [his personal cellular telephone number] on Feb. 12, 2021 related to state business.”

Our office responded that General Paxton had no responsive communications.

We understand from the complaint that reporter Allie Morris sent an unsolicited and unwelcomed text message to General Paxton’s personal cellular telephone number on February 12, 2021. Without conceding that this text message constitutes public information under the PIA, any such message would be classified as transitory information pursuant to the OAG’s records retention schedule. As such, it is permissible to dispose of the information once the purpose of

² Tex. Att’y Gen. OR2021-09095 (2021), attached as Exhibit B.

the record has been fulfilled. At the time of the request, Attorney General Paxton had no communications responsive to this request. Neither the complainants nor your letter cites any other evidence that Attorney General Paxton or the OAG have not fully complied with the PIA.

There is no violation to cure.

Allegation Number Three: Complainants believe General Paxton is turning over communications from other individuals as his own in response to public records requests.

OAG response: The OAG and Attorney General Paxton have fully complied with the PIA requests at issue in this complaint. All responsive documents have been provided.

On March 3, 2021, the OAG received a request from reporter Allie Morris for “[r]ecords of any text messages exchanged between AG Paxton and Utah Attorney General Sean Reyes related to official business, including, but not limited to, visiting a live law enforcement scenario simulator.”

On March 9, 2021, the OAG provided Morris with responsive records of the text messages exchanged between the two Attorneys General, which discussed a meeting place for dinner and appropriate attire for participation in a law enforcement scenario simulator. The request was fulfilled. Moreover, the text messages in question are classified as transitory information under OAG records retention policy and may be permissibly disposed of once the purpose of the record has been fulfilled. At the time of the request, General Paxton had no communications responsive to this request beyond what was produced to the requestor. The PIA does not obligate a custodian of records to provide every version of transitory information that existed at some point in time if those versions are no longer maintained at the time of the PIA request. Neither the complainants nor your letter cites any other evidence that Attorney General Paxton or the OAG have not fully complied with the PIA.

There is no violation to cure.

As you know, the Office of the Attorney General is statutorily charged with the responsibility of determining when a governmental entity can withhold public information pursuant to the PIA. *See* Tex. Gov’t Code § 552.301. The OAG is further obligated to provide training on complying with the PIA to all elected and appointed public officials. *See id.* § 552.012. The OAG even publishes an extensive Public Information Act handbook to educate and inform all Texans of their right to access public information and government entities’ corresponding responsibility to comply with the law. This office, and Attorney General Paxton, take this responsibility seriously. We trust this will resolve this matter.

Respectfully,

A handwritten signature in blue ink, appearing to read "Austin Kinghorn".

Austin Kinghorn
General Counsel

EXHIBIT A



Office of the Attorney General

Records Retention Schedule

10th Recertification

TSLAC Approval Date: June 17, 2020
Last Amendment Date: N/A



Office of the Attorney General of Texas

Records Retention Schedule

1. Record Series Item No.	2. Agency Item No.	3. Record Series Title and Description	4. Total Retention Period	5. Archival Code	6. Remarks	7. Legal Citations
1.1.057	61F	<p>Transitory Information</p> <p>Records of temporary usefulness that are not an integral part of a record series of an agency, that are not regularly filed within an agency's recordkeeping system, and that are required only for a limited period of time for the completion of an action by an official or employee of the agency or in the preparation of an ongoing record series.</p> <p>Transitory records are not essential to the fulfillment of statutory obligations or to the documentation of agency functions. Some examples of transitory information, which can be in any medium (voice mail, fax, email, hard copy, etc.) are routine messages; telephone message notifications; internal meeting notices; routing slips; incoming letters or memoranda of transmittal that add nothing of substance to enclosures; and similar routine information used for communication, but not for the documentation, of a specific agency transaction.</p>	AC		<p>AC = Purpose of record has been fulfilled.</p> <p>CAUTION: Records Management Officers should use caution in assigning this record series to records of an agency to make certain they are not part of another record series listed in this schedule or, for record series unique to an agency, are not part of a record series that documents the fulfillment of the statutory obligations of the agency or the documentation of its functions. The disposal of transitory information need not be documented through destruction signoffs (1.2.001) or in records disposition logs (1.2.010), but agencies should establish procedures governing disposal of these records as part of its records management plan (1.2.014).</p>	

Retention Codes (field 4)
 AC – After Closed, See field 6 for specific record series definition
 AV – Administrative Value

CE – Calendar Year End
 FE – Fiscal Year End

LA – Life of Asset
 PM – Permanent

US – Until Superseded

Archival Codes (field 5)
 A – Transfer to State Archives
 R – Review by State Archivist

EXHIBIT B



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 9, 2021

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2021-09095

Dear Ms. Downey:

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# 875994 (PIR Nos. R007857 and R008666).

The Office of the Attorney General (the "OAG") received two requests for communications of the Attorney General for specified time periods. The OAG claims the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted on behalf of one of the requestors. See Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note some of the submitted information, which the OAG marked, is not responsive to either of the instant requests for information because it was created after the date the OAG received the first request for information and falls outside the time period specified in the second request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that

¹ We assume 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.

is not responsive to the requests and the OAG is not required to release such information in response to these requests.

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 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). 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.*, 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).

The OAG states the responsive information consists of communications between members of the OAG's Executive Administration and the Criminal Prosecutions Division discussing litigation matters being handled by the OAG, as well as communications between the Attorney General and an attorney in the OAG's Executive Administration. The OAG states the communications were made for the purpose of providing professional legal services to the State. Further, the OAG represents the communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the responsive information. Thus, the OAG may withhold the responsive information under section 552.107(1).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Matthew Taylor
Assistant Attorney General
Open Records Division

MT/jm

Ref: ID# 875994

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)