



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 11, 2009

Ms. Katherine R. Fite  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2009-06319

Dear Ms. Fite:

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# 344977.

The Office of the Governor (the "governor") received two requests for all information related to the Corpus Christi State School between March 6, 2009, to March 16, 2009, and information pertaining to the Corpus Christi State School "fight club" generated between March 3, 2009, and March 17, 2009. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the Texas Department of Aging and Disability Services ("DADS"). See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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).

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<sup>1</sup>Although you also assert the attorney-client privilege under section 552.101 in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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 Texas 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.<sup>2</sup> TEX. R. EVID. 503(b)(1)(A)-(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 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, no writ). 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 that the submitted information consists of confidential communications between parties who share a privity of interest concerning legal matters affecting the state.<sup>3</sup> Further, you indicate that these communications were made for the purpose of facilitating the rendition of professional legal services pertaining to issues in which the governor, DADS,

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<sup>2</sup>Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A)-(E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

<sup>3</sup>*See* Tex. R. Evid. 503(a)(2) (defining “representative of the client” as person having authority to obtain legal services or to act on legal advice on behalf of client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

and the Texas Health and Human Services Commission share a common interest and a joint defense. You further explain that these documents were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. Based on your representations and our review of the submitted documents, we find that the information we have marked consists of privileged attorney-client communications that the governor may withhold under section 552.107 of the Government Code. *See In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). However, you have failed to demonstrate how the remaining information consists of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the client. Therefore, the governor may not withhold the remaining information under section 552.107.

You claim that the remaining submitted information is excepted from public disclosure under section 552.103 of the Government Code, which provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also*

Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

In situations such as this, in which the governmental body that received the request has no litigation interest in the information at issue, we require a representation from the governmental body whose litigation interests are at stake. DADS asserts that the information at issue is excepted from disclosure under section 552.103. DADS states that prior to the instant request, it was subject to action by the United States Department of Justice (the “DOJ”) “under the Civil Rights of Institutionalized Persons Act (“CRIPA”) . . . by virtue of the DOJ’s investigation into and report on conditions at the Lubbock State School.” DADS states that under CRIPA, the DOJ’s time frame for filing a lawsuit has not elapsed, and “it is likely that the DOJ will file a lawsuit in federal court to incorporate the settlement agreement into a judgment enforceable by the court, as that is the DOJ’s usual practice in CRIPA investigations.” In this regard, we note that the December 1, 2008, DOJ findings letter states that, if the DOJ and the state “are unable to reach a resolution regarding our concerns, the [U.S.] Attorney General may institute a lawsuit pursuant to CRIPA to correct deficiencies of the kind identified in this letter 49 days after appropriate officials have been notified of them.” *See* Letter from Acting Assistant U.S. Attorney General Grace Chung Becker, U.S. Dep’t of Justice, to Texas Governor Rick Perry (Dec. 1, 2008), “Statewide CRIPA investigation of the Texas State Schools and Centers” ([http://www.usdoj.gov/crt/split/documents/TexasStateSchools\\_findlet\\_12-1-08.pdf](http://www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf)) at 60.

DADS further explains that it is currently “anticipating federal CRIPA litigation and/or settlement negotiations with respect to the other state schools” as well. DADS states that this litigation is anticipated because on March 11, 2008, the DOJ informed the governor that it was commencing an investigation into the “conditions of care and treatment of residents at the Denton State School, pursuant to [its] authority under [CRIPA].” DADS argues that this letter to the governor is analogous to a notice letter under the Texas Tort Claims Act. In addition, DADS references a similar letter from the DOJ dated August 20, 2008, indicating that CRIPA investigations would be taken on the remaining facilities in the state. Further, DADS states litigation relating to all the state schools is reasonably anticipated because, on December 1, 2008, the DOJ issued a report on the “Statewide CRIPA Investigation of the Texas State Schools and Centers.” DADS argues that, as a result of this report, the remaining “state schools and centers now find themselves in a similar position to the Lubbock State School[.]” Based on DADS’s representations and our review, we determine that DADS reasonably anticipated litigation on the date that the governor received this request for information. Furthermore, upon review of the information at issue, we find that the submitted information relates to the anticipated litigation. Accordingly, we conclude that the governor may withhold the remaining submitted information pursuant to section 552.103.

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that

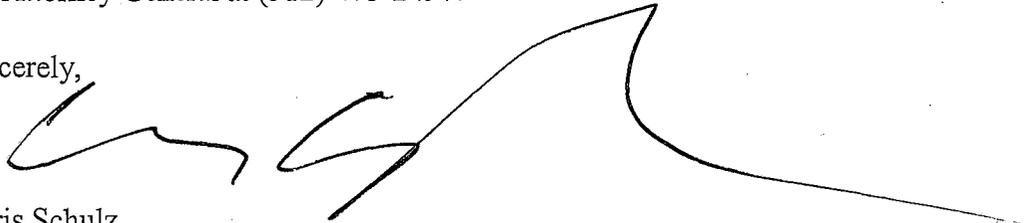
information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the information we have marked consists of privileged attorney-client communications that the governor may withhold under section 552.107 of the Government Code. The governor may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.<sup>4</sup>

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/cc

Ref: ID# 344977

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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<sup>4</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure.