



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2009

Ms. Sarah Irwin Swanson
Deputy Director of General Law
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2009-09604

Dear Ms. Swanson:

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# 347455 (PUC Request Nos. 2009-04-011 through 2009-04-029, 2009-05-019).

The Public Utility Commission of Texas (the "commission") received nineteen requests from the same requestor ("requestor number 04-011") for several categories of information concerning representation by a party to a complaint, information concerning a named individual or either of two specified entities, and information concerning specified Texas Attorney General opinions or a specified court opinion. Additionally, the commission received a separate request from a different requestor ("requestor number 05-019") for information responsive to the requests submitted by requestor number 04-011. You state that the commission has no information responsive to portions of the requests.¹ You further state that the commission has made some of the requested information available to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have also received comments from requestor number 05-019. *See Gov't Code* § 552.304 (interested party may

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *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), 452 at 3 (1986), 362 at 2 (1983).

submit written comments concerning disclosure of requested information). We have considered the submitted arguments and reviewed the submitted information.

Initially, you assert that several of the requests submitted by requestor number 04-011 have been withdrawn by operation of law because the requestor has failed to respond to itemized cost estimates for copies of the responsive documents. *See id.* § 552.2615. Under section 552.2615, a governmental body is required to provide a requestor with an estimate of charges when a request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* The relevant portion of section 552.2615 provides:

(a) . . . the governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 business days after the date the statement is sent to the requestor that

(1) the requestor will accept the estimated charge;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

Id. § 552.2615(a), (b). You provide documentation showing that you provided requestor number 04-011 with an itemized cost estimate for information responsive to his requests for communications to or from any employee of the commission mentioning the named individual or either of the two specified entities. Upon review, we agree that the cost estimates comply with the requirements of section 552.2615. Further, you state that the requestor did not respond to the issued estimates in accordance with section 552.2615. Accordingly, we agree that section 552.2615(b) is applicable as to these requests, and the commission need not provide requestor number 04-011 with the information responsive to these requests. However, because requestor number 05-019 has not withdrawn the portions of his request concerning this information, we will address your arguments against its disclosure.

Further, we note that requestor number 05-019 excepted certain information from his request concerning information that he has already seen or to which he otherwise has access. This information is not responsive to request number 05-019, and the commission need not release this information to requestor number 05-019. However, because this information is responsive to the remaining requests submitted by requestor number 04-011, we will address your arguments against its disclosure.

We note that some of the submitted information was not in existence when the commission received the requests for information from requestor 04-011 and thus is not responsive to any of the requests. The commission need not release this nonresponsive information, which we have marked, to either requestor.

Next, we note requestor number 05-019 asserts that the commission failed to comply with its procedural obligations under section 552.301(e-1) of the Government Code. Section 552.301(e-1) states that a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. *Id.* § 552.301(e-1). Requestor number 05-019 claims the commission did not send him a copy of the commission's arguments against disclosure. However, the commission has provided this office with documentation showing that the commission sent the requestor the commission's arguments by e-mail on May 7, 2009. Therefore, because the commission supplied requestor number 05-019 with a copy of the commission's comments pertaining to the submitted information, we find the commission has complied with the requirements of section 552.301(e-1).

We now address your arguments against disclosure of the submitted information. First, section 552.103 of the Government Code provides:

(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.

Id. § 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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 section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). For the purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA). You explain that a person may present a formal complaint against a utility to the commission. You state that the information you have marked relates to such formal complaints that are pending before an administrative law judge. You further state that these proceedings constitute contested cases that must be conducted according to the APA. Although requestor number 05-019 claims the commission is not a party to the proceedings at issue, we determine that the commission is a party for purposes of section 552.103. *See* 16 TEX. ADMIN. CODE § 22.102(a)(4) (2001) (Pub. Util. Comm'n of Tex., Classification of Parties). Upon review, we conclude that the commission was involved in pending litigation when it received the present requests for information. Our review of the submitted information also shows that the information you have marked is related to the pending litigation for purposes of section 552.103. Therefore,

the commission may withhold the information you have marked under section 552.103 of the Government Code.²

We note, however, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, 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 “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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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. 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).

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

You claim the information you have marked consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that these communications were between commission attorneys and staff. You further state that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Upon review, we find the commission may withhold the remaining information you have marked under section 552.107 of the Government Code. We note, however, that some of the individual e-mails contained in the submitted e-mail strings consist of communications with non-privileged parties. Accordingly, to the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. We have marked these non-privileged e-mails.

We note that the marked non-privileged e-mails include e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ See Gov't Code § 552.137(a)-(c). We note, however, that the e-mail addresses we have marked belong to each respective requestor. The requestors have a right of access to their own e-mail addresses under section 552.023 of the Government Code, and that information may not be withheld from each respective requestor under section 552.137. See *id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, with the exception of the respective e-mail addresses belonging to the requestors, the commission must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. See *id.* § 552.137(b).

You claim a portion of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. Civ. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state that the information you have marked was "created by [the commission], in preparation for the formal complaint proceedings." Based on your representations and our review, we agree that the commission may withhold the information you have marked under section 552.111 of the Government Code as attorney work product.

Finally, you inform us that some of the submitted information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, (1) the commission need not release to the requestors information that is not responsive to their requests; (2) the commission may withhold the information you have marked under section 552.103 of the Government Code; (3) the commission may withhold the information you have marked under section 552.107 of the Government Code; however, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107; (4) if the commission maintains the non-privileged e-mails separate and apart from the submitted

e-mail strings, with the exception of the e-mail addresses belonging to each respective requestor, the commission must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release; and (5) the commission may withhold the information you have marked under section 552.111 of the Government Code. The commission must release the remaining information, but any information protected by copyright must be released in accordance with copyright law.

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, 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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 347455

Enc. Submitted documents

c: Requestor (2)
(w/o enclosures)