



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2009

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2009-11801

Dear Mr. Martinez:

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# 352989 (PIR No. 09.06.04.06).

The Texas Commission on Environmental Quality (the "commission") received a request for eleven categories of information produced during a specified time period related to the transportation and disposal of radioactive waste, Studsvik, Inc., and certain license amendments. You state that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also notified Waste Control Specialists, L.L.C. ("WCS") of this request for information and of its right to submit arguments to this office as to why its information should not be released.¹ We received correspondence from WCS. We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You contend that the information submitted in Attachments C/D and D is excepted under section 552.101 in conjunction with section 2.390 of title 10 of the Code of Federal Regulations. A federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision Nos. 599 (1990), 373 (1983). Under section 2133 of title 42 of the United States Code, the Nuclear Regulatory Commission (the “NRC”) is authorized to issue licenses regarding the use, possession, transfer, and receipt of nuclear material and to promulgate rules or regulations related to the issuance of such licenses. *See* 42 U.S.C. § 2133(a).

You state that the commission has jurisdiction over radioactive processing and storage because “delegation of authority over radioactive waste processing and storage was granted to the State of Texas by the United States” through the NRC. You explain that the information at issue relates to a license renewal and amendment applications, and that commission staff “continually assesses the WCS facility regarding weaknesses in security measures[.]” You also state that the information reveals “where the components are specifically located and the details of the required security measures for these components[.]” and that the information is required to be kept confidential under a federal regulation. You explain that section 2.390 of title 10 of the Code of Federal Regulations provides NRC records regarding the issuance and renewal of a license may be kept secret by an executive order in the interest of national defense. 10 C.F.R. § 2.390(a)(1). You have provided this office with a copy of an order issued by the NRC, EA 05-090, pertaining to the confidentiality of a licensee’s increased control program for radioactive materials of quantities of concern. You state that the order and section 2.390 of title 10 of the Code of Federal Regulations require confidentiality. You refer to Table 1 of the order, which defines radioactive material quantities of concern (“RAM QC”), and explain that the license at issue is authorized for RAM QC. You assert that “when the [commission] reviews the renewal of the license, any documents generat[ed] by the [commission] which discuss these radionuclides and Increased Controls procedures are required to be withheld from disclosure to the public.” Based on your representations, we find the commission must withhold Attachments C/D and D under section 552.101 in conjunction with 2.390 of title 10 of the Code of Federal Regulations and EA 05-090.³

Next, we address the commission’s claim under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. *See* 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

³As we make this determination, we need not address the remaining arguments against disclosure of this information.

purpose of facilitating 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)-(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. See *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).

The commission seeks to withhold some of the information submitted as Attachment C under section 552.107(1). You state that the information at issue either constitutes or documents privileged attorney-client communications that were made in connection with the rendition of professional legal services to the commission. You have identified the parties to the communications. You also state that the communications were intended to be confidential, and you do not indicate that confidentiality has been waived. Based on your representations and our review of the information at issue, we find that the commission has established that some of the information at issue consists of privileged communications. Therefore, we conclude that the commission may withhold the information we have marked in Attachment C under section 552.107(1).⁴ However, we find that the commission has failed to demonstrate that the remaining information at issue constitutes or documents privileged attorney-client communications that were made in connection with the rendition of professional legal services to the commission. Thus, the remaining information in Attachment C may not be withheld under section 552.107.

⁴As our ruling on this information is dispositive, we need not address your remaining arguments against disclosure.

You assert that the remaining information in Attachment C is excepted from disclosure under section 552.103 of the Government Code, which provides 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). The 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 on the date of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." See Open Records Decision No. 588 (1991).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

You state that the information at issue pertains to pending or anticipated enforcement actions. Based on your representations and our review, we conclude that litigation was pending or reasonably anticipated regarding these attachments on the date the commission received the request for information. Furthermore, we find that the information at issue is related to pending or anticipated litigation for purposes of section 552.103(a). Accordingly, the

commission may withhold the remaining information in Attachment C pursuant to section 552.103.⁵

In summary, the commission must withhold Attachments C/D and D under section 552.101 in conjunction with federal law. The commission may withhold the information in Attachment C under sections 552.103 and 552.107(1) of the Government Code.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 352989

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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⁵As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.