



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2011

Mr. Robert Wilson
Texas Low Level Radioactive Waste Disposal Compact Commission
3616 Far West Boulevard
Suite 117, #294
Austin, Texas 78731

OR2011-04320

Dear Mr. Wilson:

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# 412748.

The Texas Low Level Radioactive Waste Disposal Compact Commission (the "commission") received a request for information related to specified proposed rules and a specified meeting, information on a named former director's computer, communications between members of the commission and named individuals and entities, and the commission's records policies. You claim the requested information is excepted from disclosure under sections 552.103, 552.106, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the commission informs us it sought clarification with respect to portions of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You have not informed us

¹We 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.

the commission received clarification of the portions of the request at issue. Thus, for the portions of the requested information for which you have not received clarification, we find the commission is not required to release information in response to those portions of the request. However, if the requestor clarifies those portions of the request for information, the commission must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

Next, we note some of the requested information appears to be the subject of a previous ruling issued by this office, Open Records Letter No. 2011-03855 (2011). In that ruling, this office concluded that the commission must withhold certain information under section 552.137 of the Government Code and must release the remaining information. You now argue information responsive to the current request that was also responsive to the previous request is excepted from disclosure under sections 552.103, 552.106, and 552.107 of the Government Code. Section 552.007 of the Government Code, however, provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See Gov't Code* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Thus, pursuant to section 552.007, the commission may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise sections 552.103, 552.106, and 552.107 for the previously released information, these sections are general exceptions to disclosure that do not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 (1) may be waived). Therefore, to the extent any of the information responsive to the current request was previously ruled upon and ordered to be released by this office, the commission may not now withhold such information under sections 552.103, 552.106, and 552.107 of the Government Code. However, with respect to the remaining requested information that was not previously ruled upon in Open Records Letter No. 2011-03855, we will address your arguments against disclosure of this information.

Section 552.103 of the Government Code provides, in 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). 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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you state, and provide documentation showing, that the requestor filed suit against the commission on December 30, 2010. You further state that this lawsuit has been dismissed for not being ripe for jurisdiction because the commission rules at issue had not been adopted. The commission then adopted the rules at issue on January 4, 2011. You state that the requestor then threatened in a newspaper article dated January 5, 2011 to consult with its attorneys and file another lawsuit. You further state the information in Exhibits D-2, D-3, D-4, and D-5 is related to the anticipated litigation. Based on your representations and

²Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

our review of the submitted documents, we find you have demonstrated that the information at issue is related to litigation that was reasonably anticipated at the time the commission received the present request for information. Accordingly, we find that with the exception of any information that has previously been released, the commission may withhold Exhibits D-2, D-3, D-4, and D-5 under section 552.103 of the Government Code.³

We note, however, that once the information at issue has been obtained by all parties to the anticipated 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 obtained from or provided to all other parties in the anticipated 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 or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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). 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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).

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 pet.). 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 assert some of the remaining information, which you have labeled Exhibit D-1, constitutes a communication between the commission and its attorneys that was made for the purpose of providing legal advice on draft rules to the commission. You also assert this communication was made in confidence and that confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the Exhibit D-1. Therefore, with the exception of any information that has previously been released, the commission may withhold Exhibit D-1 under section 552.107(1) of the Government Code.

Next, you claim the remaining information, labeled Exhibit D-6, is excepted from disclosure under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See Open Records Decision No. 460 at 3 (1987)*. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* 460 at 2; *see also Open Records Decision No. 344 at 3-4 (1982)* (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2.

You assert the remaining information contains information related to “proposed legislation concerning appropriations requests to fund the [commission’s] activities.” You also state the documents reflect policy judgments, recommendations, and proposals pertaining to the proposed legislation. Further, we note the documents reflect the draft legislation and appropriations requests were created at the direction of a state legislator. Based on these representations and our review, we conclude the information in Exhibit D-6 constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, with the exception of any information that has previously been released, the commission may withhold this information under section 552.106 of the Government Code.

In summary, with the exception of any information that has previously been ruled upon in Open Records Letter No. 2011-03855, the commission may withhold: Exhibits D-2, D-3, D-4, and D-5 under section 552.103 of the Government Code, Exhibit D-1 under section 552.107(1) of the Government Code, and Exhibit D-6 under section 552.106 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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/tf

Ref: ID# 412748

Enc. Submitted documents

c: Requestor
(w/o enclosures)