



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2014

Mr. Chris Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2014-22157

Dear Mr. Sterner:

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# 547563 (OOG ID# 311-14).

The Office of the Governor (the "governor's office") received a request for all documents and correspondence related to the governor's legal defense in a specified case. You state the governor's office is releasing some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You inform us some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-16340 (2014). In Open Records Letter No. 2014-16340, we determined the governor's office may withhold the marked information under Texas Rule of Evidence 503 and must release the remaining information. You state there has been no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the governor's office may rely on Open Records Letter No. 2014-16340 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was

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.

based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against disclosure of the submitted information, which was not responsive to the previous request for information.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The information we have marked consists of attorney fee bills subject to section 552.022(a)(16). Thus, the marked information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold this information under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the information subject to section 552.022 may not be withheld under these exceptions.

The Texas Supreme Court has held, however, the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and the attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure. We will also consider your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the attorney fee bills contain confidential communications between the governor's office and counsel for the governor's office. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the governor's office. Further, you state these communications have remained confidential. Accordingly, the governor's office may withhold the information you have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.²

Section 552.103 of the Government Code provides, in relevant part, the following:

²As we make this determination, we do not address your remaining claim for this information.

(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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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, orig. proceeding); *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). *See* ORD 551 at 4.

You state that prior to the receipt by the governor's office of the request for information, the Governor, in his official capacity, was indicted in the 390th Judicial District Court of Travis County, Texas. You further state litigation regarding the indictment was pending on the date the request for information was received by the governor's office. You assert the information not subject to section 552.022(a)(16) relates to the pending litigation. Upon review, we find litigation was pending on the date the request for information was received and the information at issue is related to the pending litigation. Accordingly, the governor's office may withhold the information not subject to section 552.022(a)(16) of the Government Code under section 552.103 of the Government Code.³

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

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

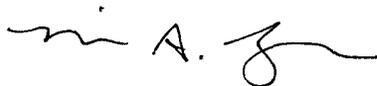
See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once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

In summary, the governor's office may (1) rely on Open Records Letter No. 2014-16340 as a previous determination and withhold or release the identical information in accordance with that ruling, (2) withhold the marked information in the fee bills on the basis of the attorney-client privilege under Texas Rule of Evidence 503, and (3) withhold the information not subject to section 552.022(a)(16) of the Government Code under section 552.103 of the Government Code. The governor's office must release the remaining submitted information in the fee bills.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ds

Ref: ID# 547563

Enc. Submitted documents

c: Requestor
(w/o enclosures)