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ATTORNEY GENERAL OF TEXAS

March 24, 2015

Ms. Leena Chaphekar
Assistant General Counsel
Employee Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2015-05603

Dear Ms. Chaphekar:

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# 557282.

The Employee Retirement System (the "system") received a request for five categories of information related to the requestor's request to change personal information held in the system's records. You state you have released some of the information. You claim 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 information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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 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. *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, 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). 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. Finally, the attorney-client privilege applies only to a confidential communication, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the submitted information consists of communications involving system attorneys, the system executive director, and other system employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. Therefore, you may generally withhold the submitted information under section 552.107(1) of the Government Code.¹ However, we note one of the e-mail strings at issue includes an e-mail received from an individual you have not demonstrated is a privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the system maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the system may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

To the extent the system maintains the e-mail we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, we will address your remaining argument against disclosure. Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

¹As our ruling is dispositive, we need not address your remaining argument against disclosure.

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 section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (the "SOAH") is considered litigation for the purposes of the APA. *See id.*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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). Further, the fact that a potential

opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state on November 12, 2014, the system sent the requestor a determination letter denying the requestor's request to change information in the system's official member records. Further, you state the determination letter provided the requestor with an opportunity to appeal the system's decision to SOAH. You acknowledge the requestor has not appealed the determination to SOAH, and "no litigation was pending" when the system received the request. However, you state the system anticipated litigation on the date the request was received. You explain and provide documentation showing the requestor replied to the letter by making the same initial request and questioning the system's jurisdiction and authority to deny the request. Upon review, we find you have not provided this office with evidence the requestor had taken any objective steps toward litigation prior to the date you received the request for information. *See* Gov't Code § 552.301(e); ORD 331. Thus, we find you have not established litigation was reasonably anticipated on the date you received the request for information. Therefore, you may not withhold the remaining information under section 552.103 of the Government Code.

In summary, the system may withhold the submitted information under section 552.107. However, if the e-mail we have marked exists separate and apart from the e-mail string to which it is attached, it may not be withheld under section 552.107 and must be released

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,



Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/ac

Ref: ID# 557282

Enc. Submitted documents

c: Requestor
(w/o enclosures)