



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 4, 2015

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2015-15942

Dear Ms. Cost:

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# 574200 (DPS PIR #15-2307).

The Texas Department of Public Safety (the "department") received a request for four categories of information, including e-mails and documents pertaining to a specific topic and reflecting specified policies, and all e-mails and attachments for a specified time period containing specified terms and e-mail addresses. You state the information responsive to categories one through three of the request does not exist.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code.² We have considered the exceptions you claim and

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. See ORD 676 at 1-2.

reviewed the submitted information, a portion of which you state constitutes a representative sample.³

Initially, we note the submitted documents indicate the department has released some of the submitted attachments in Tabs A-1 and A-2 in response to previous requests under the Act. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code 552.007*; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Although you raise sections 552.103, 552.107, and 552.111 of the Government Code for this information, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not expressly prohibit the release of the information at issue or make the information confidential. Therefore, to the extent the department previously released any of the information at issue to a member of the public, the department may not now withhold any such information under section 552.103, section 552.107, or section 552.111. To the extent the department did not previously release the submitted information to a member of the public, we will address your arguments against disclosure.

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

(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

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See Gov't Code §§ 552.301(e)(1)(D), .302*; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* Open Records Decision No. 551 at 4 (1990).

You state, and provide supporting documentation which demonstrates, prior to the department's receipt of the instant request for information, the requestor filed a lawsuit on behalf of his client styled *Spears v. Texas Department of Public Safety*, Cause No. D-1-GN-15-001665, in the 98th Judicial District of Travis County. Based upon your representations and our review, we find the department was a party to pending litigation on the date it received the request. Further, you state, and we agree, the information in Tabs A, A-1, and A-2 relates to the pending litigation. However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See id.* at 4-5. 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it may not be withheld on that basis. In this instance, some of the information at issue was either provided to or by the opposing party's attorney. As such, this information, which we have marked, may not be withheld under section 552.103 of the Government Code. We conclude the department may withhold the remaining information in Tabs A, A-1, and A-2 under section 552.103.⁴ However, we note the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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

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

has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate 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, 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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 raise section 552.107(1) for the remaining information in Tab A-1. You state these attachments are part of communications between attorneys or attorney representatives for the department and employees of the department and were made for the purpose of facilitating the rendition of professional legal services to the department. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications the department may generally withhold under section 552.107(1). We note, however, these attachments were sent to a non-privileged party. Furthermore, if the attachments are removed from the privileged e-mails to which they are attached and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the department separate and apart from the e-mails to which they are attached, the department may not withhold these non-privileged attachments under section 552.107(1). In that

instance, as you raise no further exceptions against disclosure for these attachments, the department must release them to the requestor.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information in Tab B relates to an ongoing criminal investigation. Based upon your representation and our review, we find release of Tab B would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, we conclude the department may withhold Tab B under section 552.108(a)(1).

In summary, to the extent the department previously released any of the submitted information to a member of the public, the department must release the information to the requestors. With the exception of the information we have marked, the department may withhold the remaining information in Tabs A, A-1, and A-2 under section 552.103 of the Government Code. To the extent the attachments we have marked in Tab A-1 are not maintained by the department separate and apart from the e-mails to which they are attached, the department may withhold the marked attachments under section 552.107(1) of the Government Code. The department may withhold Tab B under section 552.108(a)(1) of the Government Code. The department must release the remaining information.⁵

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

⁵We note the requestor has a right of access to his own personal e-mail address in the information that is being released. *See* Gov’t Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/dls

Ref: ID# 574200

Enc. Submitted documents

c: Requestor
(w/o enclosures)