



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 8, 2016

Ms. Ann-Marie Sheely
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2016-00660

Dear Ms. Sheely:

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# 593400.

The Travis County Attorney's Office (the "county attorney's office") received a request for 1) all information responsive to all prior requests for public information the requestor previously submitted to the county attorney's office, 2) all communications between the county attorney's office and a specified Travis County (the "county") department, as well as 3) all communications between any of five named individuals that pertain to the requestor.¹ You indicate the county attorney's office will comply with section 552.232 of the Government Code with respect to information the county attorney's office has previously released to the requestor. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the

¹You inform us the county attorney's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you indicate the remaining requested information responsive to category one above is the subject of previous requests for information in response to which we issued Open Records Letter Nos. 2015-04788 (2015), 2015-09358 (2015), 2015-09625 (2015), 2015-11637 (2015), 2015-15848 (2015), 2015-19347 (2015), 2015-24369 (2015), 2015-24880 (2015), 2015-26079 (2015), 2015-26328 (2015), and 2015-26896 (2015), in which we determined certain information is variously excepted under sections 552.101, 552.103, 552.107(1), 552.108(a)(2), 552.108(a)(4), 552.108(b)(3), 552.117(a)(1), 552.1175, 552.136, and 552.137 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We understand there has been no change in the law, facts, or circumstances on which the previous rulings were based. Thus, with regard to the remaining requested information responsive to category one above, we conclude the county attorney's office must continue to rely on Open Records Letter Nos. 2015-04788, 2015-09358, 2015-09625, 2015-11637, 2015-15848, 2015-19347, 2015-24369, 2015-24880, 2015-26079, 2015-26328, and 2015-26896 as previous determinations and withhold the information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was 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 information is or is not excepted from disclosure).

Next, you state, and we agree, some of the information you have submitted is not responsive to the request at issue. This ruling does not address the public availability of that information, and the county attorney's office need not release any non-responsive 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.

...

²We 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.

(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 section 552.103 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, 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The county attorney's office informs us that, prior to its receipt of the request for information, the requestor brought a lawsuit styled *Hopkins v. Escamilla*, Cause No. D-1-GN-15-003115, in the 345th Judicial District Court of Travis County against the county attorney's office. Thus, we agree litigation was pending when the county attorney's office received the request. Furthermore, you state, and we agree, the remaining requested information is related to the pending proceedings for purposes of section 552.103. Thus, we find section 552.103 of the Government Code is applicable to the remaining requested information.

We note, however, the opposing party to the pending litigation has seen or had access to some of the remaining requested information, which we have marked. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once an opposing party has seen or had access to information related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the county attorney's office may not withhold the marked information the requestor has seen or had access to. Accordingly, with the exception of the information the requestor has seen or had access to, which we have marked, the county attorney's office may withhold the remaining requested we have marked under section 552.103.³ We note the applicability of section 552.103 ends once the related litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350(1982).

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

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 “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)(A), (B), (C), (D), (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: (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 claim some of the information seen by the requestor is protected by section 552.107(1) of the Government Code. The information at issue consists of e-mails sent from the requestor, which you state are part of e-mail communications involving attorneys and other staff of the county attorney’s office. You state the e-mail communications were made for the purpose of facilitating the rendition of professional legal services to the county and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the county attorney’s office may generally withhold the information at issue under section 552.107(1) of the Government Code. However, as previously noted, the information at issue was sent by the requestor, who is a non-privileged party. Furthermore, if the information at issue stands alone from the remaining e-mail strings

of which it is a part, it is separately responsive to the request for information. Therefore, if the information at issue, which we have marked, is maintained by the county attorney's office separate and apart from the otherwise privileged e-mail strings in which it appears, then the county attorney's office may not withhold such information under section 552.107(1) of the Government Code. In that event, we will consider the applicability of section 552.111 of the Government Code to the non-privileged e-mails. We will also consider the applicability of section 552.111 to the remaining information.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The county attorney's office contends the information at issue consists of attorney work product. However, as previously discussed, some of this information was seen by the

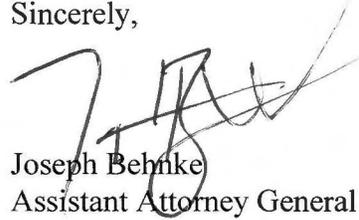
opposing party to the anticipated litigation. Moreover, we find the county attorney's office has not demonstrated any of the remaining information at issue consists of material, a communication, or mental impressions, opinions, conclusions, or legal theories of a party or party's representative prepared in anticipation of litigation or for trial. Therefore, we find the county attorney's office has failed to demonstrate the applicability of the work product privilege to the information at issue. Accordingly, the county attorney's office may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

In summary, the county attorney's office must rely on the previous determinations with regard to the remaining requested information. With the exception of the information the requestor has seen or had access to, which we have marked, the county attorney's office may withhold the information we have marked under section 552.103 of the Government Code. The county attorney's office may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, if the county attorney's office maintains this information separate and apart from the otherwise privileged e-mail strings in which it appears, then the county attorney's office must release such information. In any event, the county attorney's office must release the remaining information.⁴

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,



Joseph Behrke
Assistant Attorney General
Open Records Division

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⁴We note the information being released contains the requestor's e-mail address and other personal information to which the requestor has a right of access under sections 552.023 and 552.137(b) of the Government Code. *See* Gov't Code §§ 552.023, .137(b); *see also* Open Records Decision No. 481 at 4 (1987).

Ref: ID# 593400

Enc. Submitted documents

c: Requestor
(w/o enclosures)