



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 11, 2016

Ms. Patricia Fleming  
Assistant General Counsel  
Office of General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2016-15605

Dear Ms. Fleming:

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# 617229.

The Texas Department of Criminal Justice (the "department") received two requests for a copy a specified letter from the Food and Drug Administration (the "FDA"). You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.1081 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you have submitted.

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

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you 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 ORDs 676 at 1-2, 575 at 2.

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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is "realistically contemplated." *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is "reasonably likely to result").* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

You state the submitted information relates to litigation that was reasonably anticipated on the date the request was received. You explain if the FDA denies admission of the shipment at issue, the department intends to sue in federal court. Upon review, we find the department anticipated litigation on the date it received the present request. We also find the submitted information is related to the anticipated litigation.

We note, however, 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 that litigation to obtain it through discovery procedures. *See ORD 551 at 4-5.* Thus, once the

opposing party has seen or had access to information relating to reasonably anticipated or pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note the submitted information was obtained from the FDA. Therefore, the opposing party has seen the submitted information. Accordingly, the department may not withhold the submitted information under section 552.103 of the Government Code.

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 state the submitted information consist of a communication transmitted from the department’s attorney to the department for the purpose of facilitating the rendition of professional legal services. As noted above, the letter was obtained from the FDA. You

have not demonstrated the FDA is a privileged party for purposes of section 552.107. Accordingly, we find you have not demonstrated the submitted information constitutes a privileged attorney-client communication. Thus, the department may not withhold the submitted information under section 552.107.

Next, you raise section 552.1081 of the Government Code for the submitted information. Section 552.1081 states:

Information is excepted from the requirements of [the Act] if it contains identifying information under Article 43.14, Code of Criminal Procedure, including that of:

- (1) any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and
- (2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.

Gov't Code § 552.1081. Article 43.14(b) of the Code of Criminal Procedure states the name, address, and other identifying information of certain persons or entities involved in execution procedures are confidential. Crim. Proc. Code art. 43.14(b). You state portions of the submitted information consist of the identifying information of the manufacturer and procurers of execution drugs. Upon review, we find the information we marked consists of the identifying information of entities and a person who participate in execution procedures or manufacture, transport, test, procure, compound, prescribe, or provide supplies or substances used in an execution. Thus, we find the department must withhold the information we have marked under section 552.1081. However, you have failed to demonstrate the remaining information at issue consists of information made confidential under section 552.1081. Therefore, the department may not withhold any portion of the remaining information at issue under section 552.1081. As you raise no other exceptions to disclosure, the remaining information 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](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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/bw

Ref: ID# 617229

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)