



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 9, 2003

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-8822

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192333.

The Texas Department of Transportation ("TxDOT") received a request for all records related to contract RMS 6055-94-001 "since March 6, 2003." The requestor subsequently clarified his request to include only those documents created after March 6, 2003. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the submitted documents in Exhibit B-1 were created after the date that the department received the instant request for information. Thus, such information is not responsive to the present request, and this ruling will not address that information. We have marked these documents, which TxDOT need not release in response to this request.

We next note that some of the submitted information is computer source code information. This type of information was addressed in Open Records Decision No. 581 (1990). This office concluded that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Open Records

Decision No. 581 (1990) (construing predecessor statute). We conclude that computer source code information is the type of information contemplated by Open Records Decision No. 581 and is thus not public information as defined by section 552.002 of the Act. Therefore, it need not be released in response to this request.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege.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. 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 “for the purpose of facilitating 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 Texas 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, 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 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). 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).

¹You also argue the attorney-client privilege under section 552.101 of the Government Code. This office has concluded, however, that section 552.101 does not encompass discovery privileges in general. *See* Open Records Decision No. 575 (1990). Thus, we address your claim of privilege under section 552.107 of the Government Code.

In this instance, you explain that the submitted information “concern[s] confidential communications between a TxDOT lawyer and non-lawyers within the agency for the purpose of providing legal advice.” Also, you state that TxDOT has not waived its attorney-client privilege with regard to any of the submitted documents. Based on your representations and our review of the information, we conclude you have demonstrated that the records we have marked in Exhibits B-2 and B-3 contain information that constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to TxDOT. Accordingly, TxDOT may withhold the marked information under section 552.107(1) of the Government Code.² However, we find the remaining submitted information in Exhibits B and C does not constitute a confidential communication made for the purpose of rendering professional legal services, and therefore, TxDOT may not withhold that information under section 552.107(1).

You next claim that the information contained in Exhibit C is excepted from public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information “relates” to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.). For purposes of

²As section 552.107(1) is dispositive, we do not address your section 552.111 argument for this information.

section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA).

You inform us, and provide documentation showing, that litigation between the requestor and TxDOT is currently pending and was pending at the time the request for information was received by TxDOT. You state that the requestor is the plaintiff in a pending proceeding before the State Office of Administrative Hearings ("SOAH"), *John C. Baum v. Texas Department of Transportation*, Docket No. 601-02-3934. You further inform us that the requestor's "contract claim is related to the SOAH case." After reviewing your arguments and the submitted documents, we conclude that litigation was pending at the time TxDOT received the request for information. Furthermore, we find that the submitted information is related to that litigation. Therefore, the requested information may be withheld under section 552.103(a).

We note that 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). Most of the information in Exhibit C was obtained from or provided to the opposing party. Thus, such information is not excepted under section 552.103, and must be released to the requestor. In addition, the applicability of section 552.103(a) ends once litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, TxDOT may withhold the marked information in Exhibits B-2 and B-3 under section 552.107(1) of the Government Code. With the exception of information obtained from or provided to the opposing party, TxDOT may withhold the information in Exhibit C under section 552.103. The remaining responsive information must be released to the requestor.³

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

³Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if TxDOT receives a future request for this information from an individual other than the requestor or the requestor's authorized representative, TxDOT should again seek our decision.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 192333

Enc. Submitted documents

c: Mr. John C. Baum
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(w/o enclosures)