



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 7, 2007

Mr. Michael Greenberg  
Assistant General Counsel  
Texas Department of State Health Services  
1100 West 49th Street  
Austin, Texas 78756

OR2007-16151

Dear Mr. Greenberg:

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# 296650.

The Texas Department of State Health Services (the "department") received a request for information related to a specified narrative inspection report related to the investigation of a named individual and Wellspring Products, LLC; IonSpa; and Bella Spa Products (collectively "Wellspring"). You state that a portion of the requested information will be provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code. You also state that some of the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state that you have notified Wellspring of the request for information and of the company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments from Wellspring. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). We note that some of the submitted information consists of completed reports made by the department. Section 552.022 makes this information expressly public unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you seek to withhold some of the submitted information under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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. 677 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the department may not withhold the information at issue, which we have marked, under section 552.103 or 552.107. However, you claim that this information is subject to section 552.137 of the Government Code and possibly section 552.110. Because sections 552.110 and 552.137 constitute other laws for purposes of section 552.022, we will address the applicability of these exceptions to the submitted information.

Next, we will address your arguments under sections 552.103 and 552.107 of the Government Code for the information that is not subject to section 552.022. Section 552.103 of the Government Code provides in 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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents 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 of its receipt of 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 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> 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).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982)* (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

You state that some of the submitted information “was gathered by [the department] as a result of complaints for an unapproved medical device[.]” You further state that “the results of [the department’s] investigation into the complaints were referred to the Consumer Health and Protection Division of [our] office with a request to pursue litigation[.]” and that “it is [your] experience that most referrals result in litigation.” Based on your representations and our review of the information at issue, we find that you have demonstrated that the department reasonably anticipated litigation on the date of its receipt of this request for information. Furthermore, we find that the information you have marked is related to the anticipated litigation for purposes of section 552.103(a). Accordingly, we conclude that section 552.103 is generally applicable to the information at issue.

We note however, 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).* 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 must be disclosed. Some of the information the department claims is excepted from release under section 552.103 has been seen by the potential opposing party in the anticipated litigation. Therefore, we find that this information may not be withheld under section 552.103, and thus must be released. The department may withhold the information we have marked, which has not been provided

to the opposing party in the anticipated litigation, pursuant to section 552.103. Finally, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(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).

You state that the information you have marked consists of confidential attorney-client communications between an attorney representing the department and department representatives. Further, you explain that these communications were made for the purpose of facilitating the rendition of professional legal services to the department. You also state

that these communications have not been disclosed to third parties and that the confidentiality has not been waived. Based on these representations and our review, we conclude that the department may withhold the information we have marked under section 552.107. However, you have failed to demonstrate how any of the remaining information is confidential attorney-client communications under section 552.107. Therefore, none of the remaining information may be withheld on this basis.

Wellspring also claims that portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (2) the extent to which it is known by employees and others involved in [the company’s] business;

- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Wellspring claims that portions of the submitted information are excepted from public disclosure under section 552.110(a) as trade secrets. Upon review, we find that Wellspring has failed to demonstrate that any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Accordingly, the department may not withhold any of the information at issue under section 552.110(a) of the Government Code. However, we find that Wellspring has established that release of some of the information at issue would cause it substantial competitive injury; therefore, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. As to the remaining information at issue, however, Wellspring has only made conclusory allegations that the release of this information would result in substantial damage to its competitive position. Thus, Wellspring has not demonstrated that substantial competitive injury would result from the release of the remaining information at issue. Accordingly, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). You inform us that you have received no consent for the release of these e-mail addresses. Therefore, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, the department may withhold the information we have marked under section 552.103 of the Government Code. The department may withhold the information we have marked under section 552.107 of the Government Code. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must withhold the information it has marked under section 552.137 of the Government Code. The remaining information must be released.

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 governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

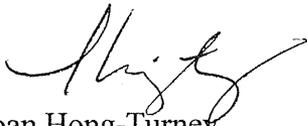
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Loan Hong-Turney  
Assistant Attorney General  
Open Records Division

LH/eeg

Ref: ID# 296650

Enc. Submitted documents

c: Ms. Rita Holden  
Senior Paralegal - Trial  
Dorsey & Whitney  
Republic Plaza Building , Suite 4700  
970 17<sup>th</sup> Street  
Denver, Colorado 80202-5847  
(w/o enclosures)

Mr. Richard Jaffe  
3200 Southwest Freeway, Suite 3200  
Houston, Texas 77027  
(w/o enclosures)