



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 11, 2009

Mr. Reg Hargrove  
Assistant Attorney General  
Public Information Coordinator  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2009-08042

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 345998 (PIR 09-24617).

The Office of the Attorney General (the "OAG") received a request for information concerning the current voter identification legislation and documents since October 1, 2008 mentioning the Texas Democratic Party. The OAG will release some information but asserts the remainder is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted sample of information.<sup>1</sup>

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 "for the purpose of facilitating the rendition of professional legal services" to the client governmental

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<sup>1</sup>We 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.

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 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 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).

The OAG states the information in Exhibits B - K are communications between the OAG attorneys, OAG staff, and clients. Furthermore, the OAG states the communications were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find the OAG may withhold most of the information under section 552.107 of the Government Code.<sup>2</sup> However, some of the individual e-mails and attachments contained in the submitted e-mail strings and memoranda consist of communications with non-privileged parties. Accordingly, to the extent these non-privileged e-mails and attachments exist separate and apart from the e-mail strings and memoranda, the OAG may not withhold them under section 552.107. We have marked these non-privileged communications. Accordingly, we will consider the OAG’s arguments under sections 552.103 and 552.111 for these non-privileged communications.

Section 552.103, the litigation exception, provides in relevant 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

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<sup>2</sup>Because section 552.107 is dispositive, we do not address the OAG’s other arguments for this information.

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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception 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 that the request for information was received, 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, no pet.); *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 under section 552.103(a).

The OAG contends the non-privileged communication we marked in Exhibit F is excepted from disclosure under section 552.103. The OAG explains Dennis Kucinich sued the Texas Democratic Party and the OAG's client, the Secretary of State (the "SOS"). Prior to the OAG's receipt of the request for information, the Fifth Circuit Court of Appeals affirmed the United States District Court's ruling against the plaintiff. The OAG asserts because the plaintiff has ninety days from the date of the appeals court's decision to appeal to the United States Supreme Court, the litigation is pending. We agree; the OAG may withhold the e-mail we marked in Exhibit F under section 552.103.<sup>3</sup>

We note 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 litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

Next, the OAG asserts the information we marked in Exhibit K is excepted from disclosure under the deliberative process privilege of section 552.111 as a draft document. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111

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<sup>3</sup>Because section 552.103 is dispositive, we do not address the OAG's section 552.111 claim.

exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no pet.). Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). The information we marked is not a document created by the OAG, its client, or a party with whom the OAG or its client has a privity of interest. Because it is not an internal communication pertaining to the OAG's policymaking process, the OAG may not withhold the information we marked in Exhibit K.

In summary, the OAG may withhold most of the information in Exhibits B - K under section 552.107. However, to the extent the non-privileged e-mails and attachments we marked exist separate and apart from the submitted e-mail strings and memoranda, they are not excepted from disclosure under section 552.107. In such an instance, the OAG may withhold the information we marked in Exhibit F under section 552.103, and the OAG must release the remaining information we marked in Exhibits H and K.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 345998

Enc: Marked documents

c: Requestor  
(w/o enclosures)