



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 4, 2009

Mr. John V. Rabel
McLeod, Alexander, Powel, & Apffel
Counsel to Port of Galveston
1415 Louisiana, Suite 3600
Houston, Texas 77002

OR2009-10777

Dear Mr. Rabel:

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# 351029.

The Port of Galveston (the "port"), which you represent, received a request for six categories of information pertaining to particular legislation. You state you have released some of the requested information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, and privileged under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.¹ We understand from the submitted information that you have notified an interested party of the port's receipt of the request for information and of his opportunity to submit comments to this office. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

¹Although you initially raised sections 552.101 and 552.102 of the Government Code as exceptions to disclosure, you did not submit to this office written comments stating the reasons why these sections would allow the submitted information; we therefore assume you no longer assert these exceptions. *See Gov't Code §§ 552.301, .302.*

Initially, we address your argument under section 552.107 of the Government Code, as this is the potentially most encompassing exception you claim. Section 552.107(1) protects information that comes 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 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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 assert that some of the submitted information constitutes confidential communications between attorneys for the port and outside legal counsel. You state these communications were made for the purpose of rendering or seeking professional legal services to the port. You also indicate these communications were confidential when made and have remained confidential. Based on your representations and our review of the information at issue, we find the information we have marked constitutes privileged attorney-client communications. Therefore, the port may withhold the marked information pursuant to section 552.107 of the Government Code.

You raise section 552.103 of the Government Code for the remaining information. Section 552.103 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 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). A governmental body that claims an exception to disclosure under section 552.103 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 is 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). Both prongs of this test must be satisfied in order for information to be excepted under section 552.103(a). See ORD 551 at 4.

You state the remaining information relates to a lawsuit styled *MBP Corp. v. Board of Trustees of the Galveston Wharves*, Cause No. 07CV0618. You inform us the plaintiff in the lawsuit filed an appeal, which was pending on the date the port received the instant request. Based upon your representations, we conclude litigation involving the port was pending when the port received the request. You also assert the information at issue relates to the port's strategy or position in the pending litigation. Based on your representations and our review of the information, we find the information at issue relates to pending litigation for purposes of section 552.103. We, therefore, conclude the port may withhold the remaining information, which we have marked, under section 552.103 of the Government Code.

We note, however, 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. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has been obtained from or provided to all opposing parties in the pending litigation is not excepted

from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 (1982).

In summary, the port may withhold the information we have marked pursuant to section 552.107 of the Government Code. The port may withhold the remaining information we have marked under section 552.103 of the Government Code.²

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, 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 351029

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address your remaining arguments against disclosure.