



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 25, 2010

Ms. Deborah Clarke Trejo  
Attorney for Edwards Aquifer Authority  
Kemp Smith, L.L.P.  
816 Congress Avenue, Suite 1150  
Austin, Texas 78701-2443

OR2010-01110

Dear Ms. Trejo:

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# 368077.

The Edwards Aquifer Authority (the "authority"), which you represent, received a request for all 1) applications submitted to the authority for above ground storage tank or underground storage tank system modifications involving tank replacements during a specified time period; 2) documents relating to the approval or denial of such applications; and 3) documents relating to a specified meeting. You state the authority has released some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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

---

<sup>1</sup>Although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. See Gov't Code § 552.022.

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 department 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 was pending or reasonably anticipated on the date the department received the request for information, 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 department must meet both prongs of this test for information to be excepted under 552.103(a).

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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). 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* ORD 518 at 5; *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 section 552.103 and that litigation is "reasonably likely to result").

You state that the submitted information relates to a property owned by the requestor's client that is subject to the authority's tank rules. You state that the authority's staff has advised the requestor's client that any new tanks on its facility are prohibited under the tank rules. You further inform us that at a "contentious meeting" between authority staff and the requestor's client, the representatives of the requestor's client alleged that the property had been purchased by the requestor's client in reliance on information it acquired from the authority in a prior "informal" meeting. You state the representatives of the requestor's client "made representations about causes of action and defenses to enforcement they would pursue in seeking their desired resolution of the issue." You also inform us, that after the meeting and before the instant request for information was received by the authority, the engineer of the requestor's client informed the authority's general counsel that a board meeting was called by the requestor's client to discuss the matter as "possible pending litigation" with an attorney. We also understand that the authority anticipates filing an enforcement action against the requestor's client if it violates any of its tank rules. You state that based on the foregoing, the authority anticipates litigation. Further, the authority explains how the information at issue relates to this anticipated litigation. Based on your representations and our review of the submitted information, we agree that you have shown litigation was reasonably anticipated when the authority received the request for information. In addition, we find that the submitted information is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, that the opposing party in the anticipated litigation has already seen or had access to document 2. Document 2 was created by the environmental consultants of the requestor's client. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then 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 have marked document 2, which was created by the opposing party and may not be withheld under section 552.103. We will address your argument under section 552.111 of the Government Code for document 2. The authority may withhold documents 1, 5, and 7 through 25 under section 552.103 of the Government Code.<sup>2</sup> However, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, you claim that documents 3, 4, and 6 are excepted under section 552.107(1) of the Government Code, which 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

---

<sup>2</sup>As our ruling is dispositive for the information subject to section 552.103, we need not address your remaining arguments against the disclosure of some of this information.

withhold the information at issue. *See* 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. *See 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 documents 3, 4, and 6 consist of confidential communications between the authority and its attorneys made for the purpose of facilitating the rendition of professional legal services. You have identified some of the parties to the communications and we are able to discern other privileged parties from the submitted information. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the authority may generally withhold documents 3, 4, and 6 under section 552.107 of the Government Code. However, document 4 consists of an e-mail string which includes e-mails that are between an authority attorney and a non-privileged party. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail string in document 4, they may not be withheld under section 552.107.

If the non-privileged e-mails exist separate and apart from the submitted e-mail string in document 4, we note that they contain information that is subject to section 552.137 of the

Government Code.<sup>3</sup> Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The e-mail address we have marked is not of the type specifically excluded by section 552.137(c). Accordingly, the marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner consents to its disclosure.<sup>4</sup>

Finally, we address your claim that document 2 is excepted under section 552.111 of the Government Code. 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.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

---

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Document 2 consists of information created by the environmental consultant of the requestor's client. Accordingly, we find that you have failed to demonstrate that the information at issue is an internal communication of the authority consisting of advice, recommendation, and opinion reflecting the policymaking processes of the authority. Accordingly, document 2 may not be withheld under section 552.111.

In summary, the authority may withhold documents 1, 5, and 7 through 25 under section 552.103 of the Government Code. The authority may generally withhold documents 3, 4, and 6 under section 552.107 of the Government Code, but to the extent the non-privileged e-mails in document 4, which we have marked, exist separate and apart from the submitted e-mail string, they may not be withheld under section 552.107. To the extent the information we have marked in document 4 does exist separate and apart from the submitted e-mail string, the authority must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner consents to its 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.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, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus  
Assistant Attorney General  
Open Records Division

LRL/jb

Ref: ID# 368077

Enc. Submitted documents

c: Requestor  
(w/o enclosures)