



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2010

Ms. Laura Pfefferle
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-01120

Dear Ms. Pfefferle:

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# 368006 (DSHS File # O16742-2010).

The Texas Department of State Health Services (the "department") received a request for information pertaining to the "re-opening" of a particular investigation. You state you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.137 of the Government Code, and protected under Federal Rule of Civil Procedure 26, Federal Rule of Evidence 502, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503.¹ We have considered your submitted arguments and reviewed the submitted representative samples of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503, rule 192.5, rule 26, and rule 502, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with any of these rules.

²We assume that the representative samples of records submitted to this office are 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.

You claim portions of the submitted information are excepted from public disclosure under section 552.103 of the Government Code, which provides 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 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 of the Government Code has the burden of providing relevant facts and documents to show that this 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 the governmental body received the request, 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 satisfy both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

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 section 552.103 and that litigation is "reasonably likely to result").

In this instance, you state the department conducted a routine inspection of the Gruver Independent School District (the "district") for compliance with the Asbestos Hazard Emergency Response Act and the Texas Asbestos Health Protection Act. You inform us non-compliance was discovered and the department issued a notice of non-compliance regarding the district's management plan. In response to the alleged violations, you state the department is currently conducting an enforcement investigation of the district. You further

state that upon conclusion of the investigation, "litigation is imminent." Thus, you contend the department reasonably anticipated litigation prior to the date it received the request. You also state the information at issue is related to the anticipated litigation. After reviewing your arguments and the information at issue, we find this information relates to the department's anticipated litigation, and section 552.103 of the Government Code is applicable.

We note 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 the anticipated 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). Thus, the information the opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, an opposing party to the anticipated litigation has already seen or had access to some of the submitted information. Therefore, this information may not be withheld under section 552.103. However, the remaining information at issue, which we have marked, may be withheld under section 552.103 of the Government Code.³ We note the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You assert some of the remaining information is excepted from public disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code 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. *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. *See* 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 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. *See* 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

³As our ruling is dispositive of this information, we need not address your remaining arguments against its disclosure.

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. *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 the information you have marked consists of confidential communications between the department’s program attorneys, upper management, and investigative staff that were made for the purpose of facilitating the rendition of professional legal services to the department. You indicate the communications at issue were intended to be and have remained confidential. Based on your representations and our review, we find the department has established the applicability of section 552.107(1) to the information you have marked. Therefore, the department may withhold the marked information under section 552.107 of the Government Code.⁴

You also raise section 552.108 of the Government Code to except a portion of the remaining information from public disclosure. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. The department is not a law enforcement agency. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See Open Records Decision Nos. 474 (1987), 372 (1983)*. Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency (1) demonstrates that the information relates to the pending case and (2) provides this office with a representation from the law enforcement agency that the law enforcement agency wishes to withhold the information.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

You state the Criminal Investigative Division of the Environmental Protection Agency (the "EPA") objects to release of the information you have marked because it relates to the EPA's pending criminal investigation. Based on this representation, we conclude the release of the marked information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (per curiam) (court delineates law enforcement interests that are present in active cases). Thus, the department may withhold the marked information under section 552.108(a)(1) of the Government Code.⁵

You assert some of the remaining information is excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

As noted above, you inform us the department is investigating the district for possible violations of state and federal asbestos regulations. You assert the department anticipates litigation pertaining to the possible violations. You claim the information you have marked under section 552.111 represents the work product of department attorneys, department staff, and agents of the department created in response to the alleged violations. Based on your representations, we conclude the department may withhold the information you have marked as attorney work product under section 552.111 of the Government Code.

The department claims the remaining information is confidential under the federal Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552. In Attorney General Opinion MW-95 (1979), this office determined that the FOIA does not apply to records held by a Texas agency or its political subdivision. Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). In this instance, the information at issue was created for, and is maintained by the department, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also* Open Records Decision No. 561 at 7 n 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). Accordingly, the department may not withhold any of the remaining information under FOIA.

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). The e-mail address, which we have marked, is not a type specifically excluded by section 552.137(c). You state the owner of the e-mail address at issue within the remaining information has not consented to its release. Accordingly, the department must withhold the marked e-mail address under section 552.137 of the Government Code.⁶

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

⁶We 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 an 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.

you have marked under section 552.107 of the Government Code. The department may withhold the information you have marked under section 552.108(a)(1) of the Government Code. The department may withhold the information you have marked under section 552.111 of the Government Code. The department must withhold the marked e-mail address under section 552.137 of the Government Code. 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, 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 368006

Enc. Submitted documents

cc: Requestor
(w/o enclosures)