



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 4, 2010

Mr. Brad Bowman  
General Counsel  
Texas Department of Licensing and Regulation  
P.O. Box 12157  
Austin, Texas 78711

OR2010-06383

Dear Mr. Bowman:

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# 377891 (TDLR ID# 6108).

The Texas Department of Licensing and Regulation (the "department") received a request for all information relating to two named individuals and three named companies. You state you are providing the requestor with a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you submitted for review is not responsive to the request for information because it was created after the instant request for information was received by the department. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release this information, which we have marked, in response to this request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Pursuant to section 603.4 of title 20 of the Code of Federal Regulations, state unemployement

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<sup>1</sup>Although you also raise section 552.111 of the Government Code, you have not submitted any arguments regarding the applicability of this exception nor have you identified any information you seek to withhold under this exception. Therefore, this decision does not address section 552.111. See Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions apply to information at issue), .302.

compensation agencies, such as the Texas Workforce Commission (the "commission"), must protect the confidentiality of information which "reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information[.]" 20 C.F.R. § 603.4(b). In Open Records Decision No. 599 (1992), this office determined that federal regulations prohibit the disclosure of "wage information" in the files of a state unemployment compensation agency. ORD 599 at 6. "Wage information" means information in the records of the commission about the "(1) Wages paid to an individual, (2) Social security account number . . . of such individual, and (3) Name, address, State, and the Federal employer identification number of the employer who paid such wages to such individual." 20 C.F.R. § 603.2(k). In this instance, the submitted records include wage information that the commission maintains as part of its administration of the state unemployment compensation program.

Information in the commission's files may be disclosed to a requesting agency or other specified parties under certain circumstances. See 20 C.F.R. §§ 603.5, .6, .21. Section 603.5(e) provides "[d]isclosure of confidential [unemployment compensation] information to a public official for use in the performance of his or her official duties is permissible." *Id.* § 603.5(e). Section 603.9 further states that for disclosures under section 603.5(e), the commission "must require the recipient to safeguard the information disclosed against unauthorized access or redisclosure . . . and must subject the recipient to penalties . . . for unauthorized disclosure[.]" and sets out the required safeguards. *Id.* § 603.9.

The submitted wage information was provided to the department by the commission. The department has submitted a confidentiality agreement with the commission, certifying that the department investigator is a public official who is using the records in the administration or enforcement of a law and that the department will maintain the confidentiality of the records. We therefore conclude that the department must withhold the wage information you have marked pursuant to section 552.101 of the Government Code in conjunction with these federal provisions.

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Gov't Code § 411.083(a); Open Records Decision No. 565 (1990). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.*

§ 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we conclude the information you have marked is confidential under chapter 411 and must be withheld under section 552.101 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. 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 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, *id.*, 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 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 indicate that the information you have marked consists of communications between department attorneys and department staff. You state that these communications were made for the purpose of facilitating the rendition of professional legal services. You have identified some of the parties to the communications. You state that the communications at issue have remained confidential. Based on your representations and our review, we agree that the information we have marked constitutes privileged attorney-client communications.

Accordingly, the department may withhold the information we have marked under section 552.107 of the Government Code. We find, however, that you have not demonstrated that any of the remaining information at issue constitutes or documents a privileged attorney-client communication. Therefore, the department may not withhold any of the remaining information at issue under section 552.107.

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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 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 [1st 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).*

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").* The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.* We note that this office considers a contested case under the Texas

Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation" for the purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991), 301 (1982).

You inform us the information you have marked pertains to pending investigations conducted by the department. You indicate as a result of such investigations, you anticipate filing a contested case before the State Office of Administrative Hearings. You state the documents have been compiled for this contested case hearing. We note that a contested case before the State Office of Administrative Hearings is considered litigation for the purposes of section 552.103. *See id.* Based on your representations and our review of the information at issue, we find the information you have marked is related to litigation that the department reasonably anticipated on the date of its receipt of this request for information. We therefore conclude that the department may withhold the information you have marked under section 552.103 of the Government Code.<sup>2</sup>

Generally, 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 either been obtained from or provided to all parties to 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 been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We note the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purposes 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). *Id.* § 552.137 (a)-(c). We have marked e-mail addresses in the remaining information that are not of a type specifically excluded by subsection (c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.<sup>4</sup>

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<sup>2</sup>As our ruling is dispositive of this information, we need not address the remaining argument against disclosure.

<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. 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 an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

In summary, the department must withhold the wage information you have marked under section 552.101 of the Government Code in conjunction with federal law. The department must also withhold the CHRI you have marked under chapter 411 of the Government Code in conjunction with section 552.101 of the Government Code. The department may withhold the information we have marked under section 552.107 of the Government Code. The department may withhold the information you have marked under section 552.103 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their 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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/eeg

Ref: ID# 377891

Enc. Submitted documents

c: Requestor  
(w/o enclosures)