



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2010

Ms. Jacqueline Hojem
Public Information Officer and Senior Paralegal
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208

OR2010-07510

Dear Ms. Hojem:

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# 375868 (MTA No. 2010-0380).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for a named former authority employee's personnel file and for that same former employee's e-mails from January 1, 2009, through the date of her termination. You state the authority will release a portion of the requested personnel file and some of the responsive e-mails to the requestor. You claim some of the remaining responsive e-mails are subject to previous determinations by this office and that the submitted e-mails are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

You first state some of the requested information was the subject of several prior requests for information received by the authority, as a result of which this office issued Open Records Letter Nos. 2010-06854 (2010), 2010-06937 (2010), 2010-07126 (2010),

¹Although you also raise sections 552.136 and 552.137 of the Government Code, the submitted records do not contain any information that could be subject to those exceptions, and you do not provide arguments explaining how they apply to the information submitted here. Therefore, we assume you no longer assert these sections as exceptions to disclosure. *See id.* §§ 552.301, .302.

²We 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.

and 2010-07290 (2010). In those rulings, we concluded the authority must withhold or may withhold certain information under sections 552.101 in conjunction with the Medical Practice Act, 552.103, 552.107, 552.111, 552.117, 552.137, and that the remaining information must be released. With regard to information responsive to the current request that is identical to the information previously ruled upon by this office, we conclude, as we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the authority may continue to rely on the rulings as a previous determination and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2010-06854, 2010-06937, 2010-07126, and 2010-07290. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information was not the subject of these prior rulings, we will consider your arguments against its disclosure.

You claim one of the submitted e-mails is excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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). 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). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You have identified the parties to the e-mail you state is subject to section 552.107 as attorneys for and representatives of the authority. You state this e-mail was made to facilitate the rendition of legal services. You also state this e-mail was intended to be and has remained confidential. Accordingly, based on your representations and our review, the e-mail we have marked is subject to the attorney-client privilege and may be withheld under section 552.107 of the Government Code.³

We next turn to your claims under section 552.103 of the Government Code for the remaining submitted e-mails. Section 552.103 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 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 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 that the governmental body received the

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

request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). 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. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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). This office has also stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that an authority employee filed a complaint with the EEOC against the authority prior to its receipt of the request for information. Based on your representations and our review of the submitted EEOC complaint, we agree the authority reasonably anticipated litigation related to the complaint on the date it received the present request for information. We also agree one of the remaining e-mails is related to the EEOC complaint for purposes of section 552.103. Thus, we agree the authority may withhold this related e-mail, which we have marked, under section 552.103 of the Government Code. However, 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 seek to withhold the remaining submitted e-mails under section 552.103 on the basis of anticipated litigation involving the named former employee. The provided information reflects that, prior to the authority's receipt of the request, the named individual made threats that reflect an intent to pursue litigation against the authority. You also state, and provide documentation reflecting, that the named former employee hired an attorney to represent her in matters related to her employment with the authority, and that she provided the authority notice of such hiring before the authority received the request for information. Accordingly, based on your representations and our review, we find the authority reasonably anticipated litigation from the named individual on the date it received the instant request for information. We also find the remaining e-mails relate to that anticipated litigation.

However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once information is obtained from or provided to all the opposing parties in the anticipated litigation, there is no interest in withholding that information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The remaining e-mails were sent from or provided to the authority's only opposing party in the anticipated litigation related to the e-mails, and therefore may not be withheld under section 552.103 of the Government Code.

In summary, the authority may withhold the information we marked under section 552.107 of the Government Code, as well as the information we marked under section 552.103 of the Government Code. As you raise no further exceptions to disclosure of the remaining submitted information, it 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 375868

Enc. Submitted documents

cc: Requestor
(w/o enclosures)