



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2011

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2011-07919

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 419740 (PIR No. 11-30200).

The Office of the Attorney General (the "OAG") received a request for 1) open records requests from July 1, 2010 to the date of the request for the civil investigative demand issued to Google on July 29, 2010; 2) correspondence related to said open records requests; and 3) communications from January 1, 2008 to the date of the request relating to Google, Yahoo, Microsoft's business practices, or the OAG's investigation of Google. The OAG released some of the responsive information and seeks to withhold the remaining information from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.¹ We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹ We 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.

Section 552.107(1) of the Government Code protects information coming 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 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). 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)(A), (B), (C), (D), (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 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. *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).

The OAG explains the communications it marked are between OAG attorneys and OAG staff made in furtherance of the rendition of professional legal services, were intended to be confidential, and their confidentiality has been maintained. Upon review, we find the OAG may withhold the information it marked under section 552.107 of the Government Code.²

Next, we consider the OAG’s section 552.103 assertion for the remaining information. Section 552.103, the litigation exception, provides in relevant part as follows:

² Because section 552.107 is dispositive, we do not address the OAG’s other arguments for this information.

(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). The OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this 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). The OAG must meet both prongs of this test for information to be excepted under section 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). 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 Gov't Code § 552.103 and that litigation is "reasonably likely to result").

In this instance, the OAG states its Antitrust Division is currently conducting two investigations for potential violations of the Texas Free Enterprise and Antitrust Act of 1983. The OAG states these investigations antedated the request for information, and it anticipated filing antitrust claims against the company when it received the request. The requestor argues the OAG does not anticipate litigation as to one of the investigations because that matter was closed in April by the United States Department of Justice. In response to the requestor's assertion, the OAG explains the federal government's action does not bind the OAG and its investigation conducted under chapter 15 of the Business and Commerce Code is ongoing. We note in order to establish the applicability of section 552.103, subsection (c) requires a governmental body to demonstrate the litigation is reasonably anticipated on the date the requestor applies to the officer for public information. Gov't Code § 552.103(c). The OAG received the request in March and has shown it reasonably anticipated litigation

at that time. The fact that the matter was closed later in April is not relevant to the applicability of section 552.103. Thus, the OAG has established the first prong of section 552.103. As to the second prong, we conclude the remaining information relates to the OAG's anticipated litigation. Thus, the OAG has demonstrated the applicability of section 552.103 to the remaining requested information.³

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The requestor argues the OAG may not withhold the civil investigative demand issued to her client, the potential opposing party at issue, because the OAG has released it in response to prior open records requests. We note the OAG has not submitted this information as part of the responsive information it seeks to withhold.

Next, the requestor contends the OAG has no authority to withhold the civil investigative demands issued to other companies if the OAG has released her client's. Section 552.007 of the Government Code provides:

(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) Public information made available under Subsection (a) must be made available to any person.

Gov't Code § 552.007. Thus, section 552.007 prohibits an agency from selectively disclosing information that is not confidential by law but that an agency may withhold under an exception to disclosure. Therefore, if an agency releases nonconfidential information to a member of the public, then the agency must release the exact same information to all members of the public who request it. However, section 552.007 does not prohibit an agency from withholding similar types of information once similar, but not the exact information, has been released. Because the OAG has not previously released the other companies' civil investigative demands to the public, it may assert an exception now to withhold them. Accordingly, the OAG may withhold the information under section 552.103.⁴

³ Because section 552.103 is dispositive, we do not address the OAG's other arguments for this information.

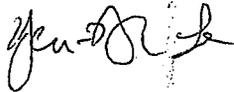
⁴ We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the OAG may withhold the information it marked under section 552.107 and the remainder under section 552.103.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/bs

Ref: ID# 419740

Enc: Submitted documents

c: Requestor
(w/o enclosures)