



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2011

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2011-09370

Dear Ms. Angadicheril:

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# 422535 (OGC No. 136818).

The University of Texas System (the "system") received a request for (1) all electronic documents and correspondence during a specified time period between a named regent, chancellor, senator, and President Powers; and (2) all electronic documents and correspondence during a specified time period to or from President Powers in which reference is made to the office of President Powers, a named senator, or named chancellor. You state you do not have any information responsive to portions of the request.¹ You also state the system will withhold some of the requested information under section 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²The previous determination issued in Open Records Decision No. 684 authorizes all governmental bodies to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

We note some of the requested information may be the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-08384 (2011), 2011-09146 (2011), and 2011-09195 (2011). In those decisions, we ruled, in part, some of the requested information was excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We note the Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007 (b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, as a general rule, if a governmental body voluntarily releases information to a member of the public, the information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). You now raise section 552.103 of the Government Code for the requested information. We note section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App— Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not prohibit the release of information or make information confidential. Thus, to the extent the information responsive to the instant request was responsive to any of the previous requests for information, it may not now be withheld under section 552.103. You also again raise sections 552.107(1) and 552.111 of the Government Code for the information responsive to the instant request. We note once this office has determined information is not excepted from disclosure, a governmental body may generally not seek another ruling pertaining to precisely the same information. *See* Gov't Code § 552.301(f); Open Records Decision No. 665 at 2 (2000) (governmental body not authorized to seek attorney general decision unless it in good faith believes valid legal arguments exist to support claimed exception). We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the system must rely on Open Records Letter Nos. 2011-08384, 2011-09146, and 2011-09195 as previous determinations and withhold or release the identical information in accordance with those rulings. *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

³We assume that the "representative sample" of information 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.

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 responsive to the previous requests for information and is not encompassed by the prior rulings, we will consider your submitted arguments.

Section 552.103 provides, in relevant part, the following:

(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 governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) 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 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 governmental body 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). To demonstrate that litigation is reasonably anticipated, the system must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture.⁴ *Id.* This office has concluded that a governmental body's receipt of a claim letter that it

⁴This office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

represents to be in compliance with the notice requirements of the Texas Tort Claims Act (“TTCA”), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance, is sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *Id.*

You state the system reasonably anticipates litigation in this instance because the system received a notice of claim on the date it received the present request for information. You do not represent the claim is in compliance with the notice requirements of the TTCA or an applicable municipal ordinance. However, the notice of claim letter states the potential plaintiff expects litigation against the system may ensue as a result of the system’s actions and that the potential plaintiff intends to and will prosecute all remedies against the system for defamation, tortious interference with contractual relationships, and privacy violations. Thus, based on your representations and the totality of the circumstances, we find the system reasonably anticipated litigation on the date the request for information was received. You state the information you have marked relates to the anticipated litigation as they pertain to the basis of the anticipated litigation. We find the information you have marked relates to the anticipated litigation. Accordingly, the system may withhold the information you have marked under section 552.103 of the Government Code.⁵

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the anticipated 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 concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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

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

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, 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 state the e-mail strings you have marked consist of communications between system attorneys and system officials, whom you have identified, that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the system may withhold the information you have marked under section 552.107(1) of the Government Code.⁶

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the system must rely on Open Records Letter Nos. 2011-08384, 2011-09146, and 2011-09195 as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent the information is not subject to the previous rulings, the system may withhold the information you have marked under section 552.103 of the Government Code and the information you have marked under section 552.107(1) of the Government Code.

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.

⁶As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

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,

A handwritten signature in cursive script, appearing to read "Jennifer Burnett".

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 422535

Enc. Submitted documents

c: Requestor
(w/o enclosures)