



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2011

Ms. Michelle Hunter  
Executive Director  
State Bar of Texas  
P.O. 12487  
Austin, Texas 78711

OR2011-13386

Dear Ms. Hunter:

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# 429971.

The State Bar of Texas (the "State Bar") received a request for all email and other correspondence from the State Bar president to any State Bar director, officer, employee, or member, during a specified time period. You have redacted e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you raise and reviewed the submitted information.<sup>3</sup>

Initially, we must address the State Bar's obligations under the Act. Section 552.301(b) requires that a governmental body inform this office which exceptions apply to a request for

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<sup>1</sup>This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code.

<sup>2</sup>Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. See Open Records Decision No. 676 at 102 (2002).

<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.111 of the Government Code, we note section 552.101 does not encompass other exceptions in the Act.

information within ten business days of receiving the request. *See* Gov't Code § 552.301(b). The State Bar failed to raise section 552.111 for the submitted information within the ten-business-day period following the request. Accordingly, we conclude that the State Bar failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, orig. proceeding); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, orig. proceeding); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.111 of the Government Code is a discretionary exception to disclosure that a governmental body may waive. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111). In failing to comply with the requirements of section 552.301, the State Bar has waived its claim under section 552.111. Accordingly, the State Bar may not withhold any of the information at issue under section 552.111 of the Government Code. However, we will address your arguments under the exceptions that you timely raised.

Section 552.103 of the Government Code provides, in relevant 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 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 commission 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, orig. proceeding); *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 governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.<sup>4</sup> See Open Records Decision No. 555 (1990); see also 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. See Open Records Decision No. 361 (1983).

You state a portion of the submitted information pertains to an issue in which an individual complained about certain activities undertaken by the State Bar. You further state that individual submitted a draft of a petition to the State Bar, which he indicated he would file. Therefore, you state this information relates to anticipated litigation. Based on these representations and our review, we find the State Bar reasonably anticipated litigation with respect to this matter on the date it received the request for information, and the information at issue relates to that anticipated litigation. Accordingly, we conclude the State Bar may withhold the information we have marked under section 552.103(a) of the Government Code.

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 reasonably anticipated. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

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<sup>4</sup>This office also has concluded that 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).

The remaining information you seek to withhold under section 552.103 concerns a separate issue, for which the State Bar and the individual in question entered into a mediation agreement. Although you state that the individual subsequently indicated the possibility of further legal action, you do not inform our office that, at the time the State Bar received the present request, anyone had taken any concrete steps toward the initiation of litigation regarding this matter. Consequently, we find you have failed to demonstrate the State Bar reasonably anticipated litigation regarding the second matter when it received the present request for information. As such, we conclude the State Bar may not withhold the remaining information under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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 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 pet.). 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 indicated was sent or received for the purpose of providing legal advice. You have identified the parties to these e-mails, and you state the e-mails were intended to be confidential and have remained so. Based on these

representations, we conclude the information we have marked is subject to the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code.

In summary, the State Bar may withhold the information we have marked under section 552.103(a) of the Government Code. The State Bar may withhold the information we have marked under section 552.107(1) 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](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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/sdk

Ref: ID# 429971

Enc. Submitted documents

c: Requestor  
(w/o enclosures)