



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 20, 2012

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2012-00918

Dear Mr. Smith:

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# 441762 (HHSC OR-20111018-6322).

The Texas Health and Human Services Commission (the "commission") received a request for (1) a specified grievance cause number; (2) audio recordings dated October 17, 2011 at 9:00am; (3) audio recordings of the proceedings that were recorded by a specified administrative law judge ("ALJ") and the Avaya Conference Phone System; and (4) any hand written notes by the specified ALJ of the proceedings. You state the audio recordings have been provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.144 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although you initially raised sections 552.104 and 552.110 of the Government Code, you have not submitted any arguments explaining how these exceptions apply to the submitted information. Therefore, we assume you have withdrawn these exceptions. See Gov't Code §§ 552.301, .302. Additionally, although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>2</sup>We assume 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 those records contain substantially different types of information than those submitted to this office.

Section 552.103 of the Government Code provides:

(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.

*Id.* § 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). *See* ORD 551 at 4.

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.* You state in circumstances where an employee has been terminated and that termination has been contested and sustained through a grievance hearing, the commission may reasonably expect the requestor to file suit challenging the commission's actions. However, upon review, we find you have made only conclusory statements that the commission anticipates litigation, and have provided no concrete evidence to support your claim. Thus, you have failed to demonstrate litigation was reasonably anticipated on the date the commission received the request. Accordingly, the commission may not withhold the submitted 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). 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, orig. proceeding). Section 552.107(1) generally excepts an entire communication 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).

In this case, the information at issue consists of handwritten notes created by an ALJ during a commission grievance hearing. We find you have failed to demonstrate how the submitted information consists of communications between privileged parties for the purpose of facilitating the rendition of professional legal services, thus falling within the protection of the attorney-client privilege. Therefore, the commission may not withhold the submitted information under section 552.107(1) of the Government Code.

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Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work-product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6–8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7. With regard to the commission's grievance hearing process, you state:

[t]he purpose of the grievance hearing is to ensure eligible employees are treated consistently according to agency rules and provided recourse when disciplinary actions are taken. This procedure may be fairly characterized as litigation. It is an adversarial proceeding presided over by a neutral and impartial ALJ. The employee is presented with formal notice of the basis for the disciplinary action. [The commission] is always represented by an attorney; the grievant may or may not have an attorney.... Following the close of the hearing, the ALJ will summarize her findings with written findings of fact and conclusions of law, and issue a final order that is not appealable.

With regard to the ALJ's role in the process, you further state:

[i]n a grievance hearing, the commission acts through its ALJ; the ALJ is the commission's agent and representative, though acting in a non-advocacy role. Her job as a tribunal is to make the correct decision for the commission, not

to advocate. She is nonetheless fully vested and imbued with all the authority of the commission to decide the outcome of the grievance hearing. For all practical purposes, during a grievance hearing the ALJ is the commission.

As previously noted, a governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation *by or for a party or a party's representative*. Also as previously noted, you state that the ALJ is "neutral and impartial." You further state that the ALJ "is considered a neutral fact-finder, not an advocate" whose "job as a tribunal is to make the correct decision for the commission[.]" Additionally, you inform us the commission is "always represented by an attorney" during a grievance hearing. Upon review of your representations, we find that in its role as the employer of the ALJ, who is an impartial and neutral fact-finder in a commission grievance proceeding, the commission cannot be considered a party to the grievance proceeding itself for work product purposes. Thus, we are unable to conclude that the ALJ is a party's agent or representative for purposes of the work product privilege. Accordingly, as the notes at issue were not prepared by a party to the grievance hearing, or such party's representative or agent, the commission may not withhold the submitted information under section 552.111 of the Government Code on the basis of the work-product privilege.

Finally, we understand you to claim that the submitted information is excepted from disclosure under section 552.144(1) of the Government Code,<sup>3</sup> which provides:

The following working papers and electronic communications of an administrative law judge at the State Office of Administrative Hearings are excepted from [required public disclosure]:

- (1) notes and electronic communications recording the observations, thoughts, questions, deliberations, or impressions of an administrative law judge[.]

*Id.* § 552.144(1). You contend that the submitted information consists of the types of notes "contemplated by [section] 552.144(1)." However, the commission's ALJ is not an administrative law judge at the State Office of Administrative Hearings (SOAH), and therefore, her notes are not subject to section 552.144. Thus, we conclude that the commission may not withhold the submitted information under section 552.144(1) of the

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<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.144, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Government Code. As you claim no other exceptions to disclosure, the commission must release the submitted information.<sup>4</sup>

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,



Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/dls

Ref: ID# 441762

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>The commission asks for a previous determination to withhold ALJ notes in the future. We decline your request for a previous determination.