



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2012

Ms. Sarah Irwin Swanson
Deputy Director of General Law
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2012-03077A

Dear Ms. Swanson:

This office issued Open Records Letter No. 2012-03077 (2012) on February 28, 2012. We have examined this ruling and determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on February 28, 2012. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 453126.

The Public Utility Commission of Texas (the "commission") received a request for information relating to a named business entity from September 24, 2011, through December 8, 2011. You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. Additionally, you state that the request may implicate the proprietary interests of Glacial Energy of Texas, Inc. ("Glacial"). Accordingly, you notified Glacial of this request for information and of its right to submit arguments to this office as to why the information should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments submitted by an attorney for Glacial. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created prior to the time period specified in the request or does not pertain to Glacial. This ruling does not address the public availability of non-responsive information, and the commission is not required to release non-responsive information in response to this request.

You assert some of the submitted information is excepted from disclosure under section 552.107 of the Government Code, which 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 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 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.* 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, orig. proceeding). 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 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 portions of the remaining submitted information are excepted from disclosure under the attorney-client privilege. You explain the information at issue constitutes communications between commission attorneys and employees concerning settlement negotiations with Glacial and prior requests under the Act. You state these communications were intended to be confidential and they have remained confidential. Based on these

representations, and our review, we agree section 552.107 is applicable to the information at issue, and the commission may withhold this information, which we have marked, under section 552.107(1) of the Government Code.¹

You claim most of the remaining information at issue is excepted from disclosure under section 552.103 of the Government Code, which 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 section 552.103 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 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). A 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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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) (finding 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"). We note contested cases conducted under the Administration Procedure Act (the "APA"), chapter 2001 of the

¹As our ruling is dispositive, we need not address your arguments under sections 552.103 and 552.111 for the information at issue.

Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (“SOAH”) is considered litigation for the purposes of the APA. *See id.*

You state the commission may impose administrative penalties against a regulated entity, such as Glacial, that violates the Public Utility Regulatory Act (“PURA”) or a rule or order adopted under PURA, or impose a penalty, or revoke, suspend or amend a retail electric provider’s license for failure to comply with the certification requirements in PURA. *See* Util. Code §§ 15.023(a), 39.356, 39.357. You explain such proceedings are subject to the Administrative Procedures Act. *Id.* § 15.024(f). You further explain that in November 2010, the commission conducted a compliance audit of Glacial, as a result of which the commission notified Glacial in a pre-notice of violation letter that it would recommend administrative penalties for violations of PURA and rules adopted under PURA. You state the commission and Glacial are currently involved in settlement negotiations regarding these alleged violations, and if a settlement is not reached, the case will be heard at SOAH. Based on your representation and our review, we find the commission reasonably anticipated litigation on the date it received the instant request. We also find the information at issue is related to the anticipated litigation.

However, if the opposing party to litigation has already seen or had access to information relating to the litigation through discovery or otherwise, then there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982). In this instance, some of the information at issue was received from the opposing party in the anticipated litigation. Accordingly, this information has been seen by the opposing party in the anticipated litigation, and the commission may not withhold this information under section 552.103 of the Government Code. *See id.* Thus, the commission may only withhold the information we have marked under section 552.103 of the Government Code.²

Glacial argues portions of its information are confidential under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm). Upon review, we find Glacial has demonstrated portions of the information at issue constitute commercial or financial information, the release of which

²As our ruling is dispositive, we need not address your argument under section 552.111 for portions of the information at issue.

would cause the company substantial competitive injury. Accordingly, the commission must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Glacial has made only conclusory allegations that release of any of the remaining information at issue would cause the company substantial competitive injury. *See* ORD 661; *see also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the commission may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We note that some of the remaining information is excepted from public disclosure under section 552.136 of the Government Code.³ Section 552.136 states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, we find the commission must withhold the information we marked under section 552.136.

We also note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The commission must withhold the e-mail addresses we have marked under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release.⁴ *See id.* § 552.137(b). We note, however, one of the e-mail addresses belongs to the requestor. Accordingly, this requestor has a right of access to his own e-mail address and it may not be withheld from him under section 552.137. *See id.* § 552.023(a); ORD 481 at 4 (privacy theories not implicated when individual requests information concerning herself).

Finally, we note portions of the submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a personal e-mail address under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the commission may withhold the information we have marked under sections 552.107(1) and 552.103 of the Government Code. The commission must withhold the information we have marked under sections 552.110(b) and 552.136 of the Government Code. Unless the owners of the e-mail addresses at issue affirmatively consent to their release, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The commission must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.⁵

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 453126

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).