



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2012

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2012-07958

Dear Ms. Alexander:

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# 454897.

The Texas Department of Transportation (the "department") received a request for several categories of information pertaining to (1) work done at a specified location during a specified time period, (2) damage to light poles at two specified locations during a specified time period, and (3) claim number P120402. You state the department is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have

¹Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded 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). Further, although you also raise Texas Rule of Civil Procedure 192.5 for the submitted information, we note the proper exception to raise when asserting the attorney work product privilege is section 552.111 of the Government Code in this instance. *See* Open Records Decision No. 677 (2002).

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information includes a CR-3 report completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *Id.* § 550.065(b). However, section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the department or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute.³ In this instance, the requestor has provided the department with the required information pursuant to section 550.065(c)(4). Although you seek to withhold this information under sections 552.103, 552.107, and 552.111 of the Government Code, we note a statutory right of access generally prevails over the exceptions to public disclosure under the Act. *See, e.g.,* Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act inapplicable to information statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Accordingly, the submitted CR-3 report, which we have marked, must be released in its entirety pursuant to section 550.065(c)(4) of the Transportation Code.

Section 552.103 of the Government Code provides in relevant part as follows:

(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

²We 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 those records contain substantially different types of information than that submitted to this office.

³*See* Transp. Code § 550.0601 ("department" means Texas Department of Transportation).

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(a) 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. *See 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101.

You state; and provide documentation showing, prior to the date the department received the instant request for information, the department received a notice of claim from the insurance company for an entity whose driver was involved in an accident. You affirmatively state the notice of claim meets the requirements of the TTCA and alleges negligence on the part of the department. Based on your representations, we find the department reasonably anticipated litigation on the date it received the request for information. You further state the submitted information is related to the anticipated litigation. Therefore, section 552.103 is generally applicable to the remaining information.

We note, however, the opposing party has seen or had access to most of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once the opposing party in pending litigation has seen or had access to

information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the department may withhold under section 552.103 those portions of the remaining information, which we have marked, that the opposing party to the litigation has not seen or had access to. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We will address your remaining arguments under sections 552.107 and 552.111, as well as the applicability of section 552.130 of the Government Code, for the information the opposing party has seen or had access to.⁴

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. *See* 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. *See* 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. *See 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 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. *See 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 the confidentiality of a communication has been maintained. Section 552.107(1)

⁴The 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).

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 claim section 552.107(1) of the Government Code for the remaining information. You state the information at issue consists of communications involving the department's attorneys and staff. However, we note the information at issue consists of communications between the department and the opposing party to the litigation, a non-privileged party. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information, and the department may not withhold that information under section 552.107(1) of the Government Code.

You also claim the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "[a]n 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 v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. 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 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. TEX. R. CIV. P. 192.5; 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

(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.

You claim the remaining information discloses attorney work product. However, as previously noted, the remaining information consists of communications with the opposing party to the anticipated litigation, a non-privileged party. Because this information has been communicated with a non-privileged party, we find the department has failed to demonstrate the applicability of the work product privilege to the information at issue. Accordingly, the department may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

A portion of the remaining information may be subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. We note section 552.130 protects personal privacy. In this instance, the requestor may be attorney for an individual whose motor vehicle record information is at issue, and thus may be the authorized representative of this individual. Thus, if the requestor is the authorized representative of an individual whose information is at issue, the requestor has a right of access to the marked motor vehicle record information pertaining to that individual under section 552.023 of the Government Code. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Accordingly, the department must withhold the marked motor vehicle record information under section 552.130 of the Government Code; however, if the requestor is the authorized representative of an individual whose information is at issue, then the motor vehicle record information pertaining to that individual may not be withheld under section 552.130.

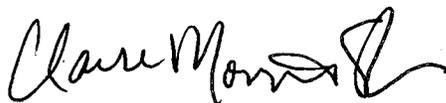
In summary, the department may withhold the information we marked under section 552.103 of the Government Code. The department must release the remaining information, including the marked CR-3 report pursuant to section 550.065(c)(4) of the Transportation Code. In releasing the remaining information, the department must withhold the marked motor vehicle record information under section 552.130 of the Government Code; however, if the requestor is the authorized representative of an individual whose information is at issue, then the motor vehicle record information pertaining to that individual may not be withheld under section 552.130.

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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a large initial "C" and "M".

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 454897

Enc. Submitted documents

c: Requestor
(w/o enclosures)