



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 23, 2012

Ms. Molly Cost  
Assistant General Counsel  
Texas Department of Public Safety  
5805 North Lamar Boulevard, Box 4087  
Austin, Texas 78773-0001

OR2012-13434

Dear Ms. Cost:

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# 463043 (PIR# 12-1830).

The Texas Department of Public Safety ("DPS") received a request for information regarding any communication between DPS and the Texas Secretary of State (the "SOS") regarding the "Texas voter ID law." You claim the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after DPS received the request. This ruling does not address the public availability of any information that is not responsive to the request, and DPS is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ *dism'd*).

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 (2002), 677 (2002)*. The proper exceptions to raise when asserting the attorney client and work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See Open Records Decision Nos. 676, 677*.

Section 552.107(1) of the Government Code protects information coming 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 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, and lawyer representatives. 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). 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) 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 some of the information at issue consists of confidential communications between attorneys for DPS, the SOS, and the Office of the Attorney General (the “OAG”), and employees of DPS and the SOS. We understand you to assert DPS, the SOS, and the OAG share a common legal interest with respect to the information at issue. You inform us the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the State of Texas. You further state these communications were not intended to be, and have not since been, disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. Based on your representations and our review of the documents at issue, we find you have established this information consists of privileged attorney-client communications. *See In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the

“joint-defense” privilege incorporated by rule 503(b)(1)(c)). Therefore, DPS may withhold the information you have marked under section 552.107.<sup>2</sup>

You assert the remaining responsive information is excepted from disclosure under section 552.103 of the Government Code, which provides in 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 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 from disclosure under section 552.103(a).

You contend the remaining information is excepted from disclosure under section 552.103 because it relates to a pending lawsuit: *State of Texas v. Eric H. Holder, Jr., Attorney General of the United States*, No. 1:12-cv-00128 (U.S.D.C., D.C.-filed January 24, 2012). However, DPS is not a party to this pending litigation and, therefore, does not have a litigation interest in the matters for purposes of section 552.103. See Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. The OAG has submitted a written representation to our office stating it objects to release of the information at issue because it relates to pending litigation against the State of Texas. Based on these representations and our review, we

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<sup>2</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

determine the information at issue is related to litigation that was pending when DPS received the request for information. Accordingly, we conclude section 552.103 is generally applicable to the remaining responsive information.

However, DPS and the OAG seek to withhold information that the United States Department of Justice, as opposing party to the pending litigation, has already seen or had access to. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information at issue that the United States Department of Justice has already seen or had access to, which we have marked, is not excepted from disclosure under section 552.103, and DPS must release it to the requestor. However, DPS may withhold the remaining information at issue under section 552.103 of the Government Code.

To conclude, DPS may withhold the information you have marked under section 552.107 of the Government Code. With the exception of the information we have marked for release, DPS may withhold the remaining responsive information under section 552.103 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.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tch

Ref: ID# 463043

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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