



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 23, 2016

Ms. Lauren Downey  
Assistant Attorney General  
Public Information Coordinator  
General Counsel Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2016-04268

Dear Ms. Downey:

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# 600891 (PIR No. 15-43050).

The Office of the Attorney General (the "OAG") received a request for information pertaining to Biomax Procurement Services, the Center for Medical Progress, Planned Parenthood, five named individuals, and a specified term.<sup>1</sup> You state the OAG will release some information. Additionally, you state the OAG has redacted certain information pursuant to Open Records Decision No. 684 (2009),<sup>2</sup> and Open Records Letter

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<sup>1</sup>We note the OAG sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

No. 2011-18124 (2011).<sup>3</sup> You state the OAG will continue to rely on Open Records Letter Nos. 2015-21370 (2015), 2015-21720 (2015), and 2015-22212 (2015) with respect to some of the requested information.<sup>4</sup> *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>5</sup>

Initially, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-01540 (2016) and 2016-02643 (2016). In Open Records Letter No. 2016-01540, we concluded the OAG may withhold certain information under sections 552.103 and 552.108(a)(1) of the Government Code. In Open Records Letter No. 2016-02643, we concluded the OAG may withhold certain information under section 552.107(1) of the Government Code. There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the OAG may continue to rely on Open Records Letter Nos. 2016-01540 and 2016-02643 as previous determinations and withhold the identical information in accordance with those rulings. *See* ORD 673 (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not

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<sup>3</sup>In Open Records Letter No. 2011-18124 this office issued the OAG a previous determination authorizing it to withhold an employee's user ID under section 552.139 of the Government Code without the necessity of requesting a decision from this office.

<sup>4</sup>In Open Records Letter No. 2015-21370, this office held the OAG may withhold the information at issue in that ruling under section 552.108(a)(1) of the Government Code. In Open Records Letter No. 2015-21720, this office held the OAG must withhold certain information under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code, may withhold certain information under section 552.103 of the Government Code, and must release the remaining information. In Open Records Letter Ruling No. 2015-22212, this office held the OAG may withhold the certain information under section 552.107(1) of the Government Code, and may withhold the remaining information at issue in that ruling under section 552.108(a)(1) of the Government Code.

<sup>5</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

excepted from disclosure). Next, we address your arguments against the disclosure of the submitted information that is not subject to these prior rulings.

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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state the information you marked relates to a pending case in which the OAG is representing the Texas Department of State Health Services (the "department"), the OAG's client agency. The OAG informs us a lawsuit styled *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services v. Traylor*, was pending against the department in the United States District Court for the Western District of Texas, Austin Division, at the time the OAG received the request. Therefore, we agree litigation involving the OAG was pending on the date the OAG received the present request for information. You also assert the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to

the pending litigation. Therefore, we conclude the OAG may withhold the information it marked under section 552.103 of the Government Code.<sup>6</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending 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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 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 to only 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 to only 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 that the confidentiality of a communication has been maintained. Section 552.107(1)

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 remaining information consists of communications between OAG attorneys and OAG staff regarding various legal issues. You explain the communications were made between privileged parties for the purpose of providing professional legal services to the OAG. Additionally, you state the communications were not intended to be disclosed and have not been disclosed to any non-privileged parties. Upon review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the remaining information. Therefore, the OAG may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the OAG may continue to rely on Open Records Letter Nos. 2016-01540 and 2016-02643 as previous determinations and withhold the identical information in accordance with those rulings. The OAG may withhold the information it marked under section 552.103 of the Government Code. The OAG may withhold the remaining information under section 552.107(1) 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/bw

Ref: ID# 600891

Enc. Submitted documents

c: Requestor  
(w/o enclosures)