KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 22, 2016

Mr. Lance Brenton
General Counsel
Texas Board of Architectural Examiners
P.O. Box 12337
Austin, Texas 78711

OR2016-21371

Dear Mr. Brenton:

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# 628377.

The Texas Board of Architectural Examiners (the "board") received a request for information related to any complaint against the requestor, including a specified complaint, and complaints against any architect for violation of a specified rule. You state the board has released 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, and privileged under Texas Rule of Civil Procedure 192.3.[1] We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state the board sought clarification with respect to a portion of the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear,

[1]Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and 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). Further, although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege in this instance are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You state the board has not received a response from the requestor. Thus, for the portion of the requested information for which you have sought but have not received clarification, we find the board is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the board must seek a ruling from this office before withholding any responsive information from the requestor. *See* Gov't Code § 552.222; *City of Dallas*, 304 S.W.3d at 387. However, we will address the applicability of your arguments to the submitted information.

Next, we address the requestor's contention that some of the requested information, or information of the same type as the requested information, was previously released to another person. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision No. 518 at 3 (1989). In this instance, the requestor contends some of the requested information was previously released to another individual. However, we note the board has identified this individual as a consultant hired by the board, and the submitted documentation reveals the information was provided to this individual in his capacity as a consultant. We find the release of the information to the requestor in his capacity as a hired consultant for the board did not constitute a release to the public for purposes of section 552.007 of the Government Code. *See, e.g.*, Open Records Decision No. 666 (2000) (release of information to citizen advisory board did not implicate section 552.007). Further, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the requestor does not state, and we have no indication, the remaining information at issue was released in its exact form to any member of the public. Accordingly, we find section 552.007 of the Government Code is inapplicable. Thus, we will consider the board's arguments against release of the information.

Next, you argue some of the submitted information is excepted from public disclosure pursuant to Texas Rule of Civil Procedure 192.3. We note this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure are "other law" that make information confidential for the purposes of section 552.022. *See* Gov't Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under the Act or other law); *see also In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In this instance, the information you seek to withhold on this basis does not fall into any of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, Texas Rule of Civil

Procedure 192.3 is not applicable. Accordingly, we conclude the board may not withhold any portion of the submitted information under Texas Rule of Civil Procedure 192.3.

Section 552.103 of the Government Code provides in pertinent 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.
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> . . .
>
> (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 the section 552.103(a) exception 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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 from disclosure under section 552.103(a).

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission).

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." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney

determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You claim some of the submitted information, which you have marked Exhibits 1 through 6, is protected by section 552.103 of the Government Code. You explain the board initiated a contested case proceeding upon receipt of a complaint that conduct in violation of a rule or statute enforced by the board had occurred. *See* 22 T.A.C. § 1.164; *see also* Occ. Code § 1051.252(a). You state the board conducted an investigation in anticipation of addressing the violation in a contested case hearing. You state the respondent has requested a hearing that will be conducted according to the provisions of the APA at the State Office of Administrative Hearings. *See* 22 T.A.C. §§ 1.165, .231, .232; ORD 588. Based on your representations and our review, we find the board reasonably anticipated litigation on the date it received the present request for information. Further, you explain the information at issue is related to the contested case. Upon review, we agree the information at issue is related to the anticipated litigation for purposes of section 552.103. Thus, the board may withhold Exhibits 1 through 6 under section 552.103 of the Government Code.[2]

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "to facilitate 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.

[2]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 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, which you have marked Exhibit 7, consists of communications involving attorneys for the board and board employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the board. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the board may generally withhold Exhibit 7 under section 552.107(1) of the Government Code.

We note, however, the e-mail string submitted as Exhibit 7 includes e-mails received from the requestor and his attorney, who are not privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the board separate and apart from the otherwise privileged e-mail string in which they appear, then the board may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

You 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); 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 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 attorney work product privilege of section 552.111 of the Government Code for the non-privileged e-mails we marked. However, we find no portion of the information at issue was created by an attorney for the board for trial or in anticipation for litigation. Accordingly, the board may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code.[3] Section 552.137 of the Government Code 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). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the board must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the board may withhold Exhibits 1 through 6 under section 552.103 of the Government Code. The board may generally withhold Exhibit 7 under section 552.107(1)

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[3]The 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).

of the Government Code; however, if the marked non-privileged e-mails are maintained by the board separate and apart from the otherwise privileged e-mail string in which they appear, then the board must release them. In releasing such e-mails, the board must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.[4]

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, 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,

Claire Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 628377

Enc. Submitted documents

c: Requestor
(w/o enclosures)

[4]We note the requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b).