



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 31, 2017

Mr. Erik Brown
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2017-11817

Dear Mr. Brown:

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# 660520 (TDCJ#AL0007).

The Texas Department of Criminal Justice (the "department") received a request for documents and correspondence (1) between the department and named entities and (2) relating to named entities. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.1081 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

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 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. 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 submitted information consists of communications between the department’s internal and outside attorneys and staff. You explain the communications were made for the purpose of facilitating the rendition of professional legal services. You also state the communications were intended to be confidential and have remained confidential. Thus, the department may generally withhold the submitted information under section 552.107(1) of the Government Code. We note, however, the e-mail strings include e-mails received from and sent to parties with whom you have not demonstrated the department shares a privileged relationship. Furthermore, if the e-mails received from and sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mails string in which they appear, then the department may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. In that case, we will address your remaining arguments against disclosure.

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 remaining information relates to pending litigation styled *Texas Department of Criminal Justice v. Food and Drug Administration*, Cause No. 3:17-CV-00001, in the United States District Court, Southern District of Texas, Galveston Division. Upon review, we find litigation was pending on the date the department received the present request. We also find the remaining information is related to the anticipated litigation.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the information at issue is not excepted under section 552.107, we note some of the information was provided to or seen by the opposing party. Accordingly, the department may not withhold such information under section 552.103 of the Government Code. However, the department may withhold the information we marked under section 552.103. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also raise section 552.1081 of the Government Code for the remaining information. Section 552.1081 states:

Information is excepted from the requirements of [the Act] if it contains identifying information under Article 43.14, Code of Criminal Procedure, including that of:

- (1) any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and
- (2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.

Gov't Code § 552.1081. Article 43.14(b) of the Code of Criminal Procedure states the name, address, and other identifying information of certain persons or entities involved in execution procedures are confidential. Crim. Proc. Code art. 43.14(b). You state portions of the information at issue consist of the identifying information of individuals or entities that manufacture, transport, test, procure, compound, prescribe, or provide execution drugs. Upon review, we find some of the information at issue consists of the identifying information of entities and persons who participate in execution procedures or manufacture, transport, test, procure, compound, prescribe, or provide supplies or substances used in an execution. However, you have failed to demonstrate the remaining information at issue consists of information made confidential under section 552.1081. Thus, with the exception of the information we marked for release, we find the department must withhold the information you marked and we marked under section 552.1081.

We note some of the remaining information may be 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 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.

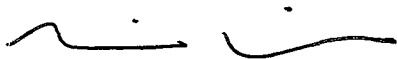
In summary, the department may generally withhold the submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we marked exist separate and apart from the otherwise privileged e-mails string in which they appear, then the department may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the e-mails are not excepted from disclosure under section 552.107 of the Government Code, the department (1) may withhold the information we marked under section 552.103 of the Government Code, (2) except where we marked for release, must withhold the information it marked and we marked under

section 552.1081 of the Government Code, and (3) must release any remaining information in accordance with copyright law.

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/bw

Ref: ID# 660520

Enc. Submitted documents

c: Requestor
(w/o enclosures)