



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 15, 2019

Mr. Adam Bitter
General Counsel
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

OR2019-10082

Dear Mr. Bitter:

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# 762164.

The Office of the Secretary of State (the "secretary of state's office") received a request for all e-mails from a named secretary of state's office official's e-mail address during a specified time period. You state you have released some information to the requestor. You state you will redact some information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.

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.

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-10080 (2019). In that ruling, we determined the secretary of state's office may withhold the information at issue under section 552.108(a)(1) of the Government Code on behalf of the Office of the Attorney General. We understand there is no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the secretary of state's office may rely on Open Records Letter No. 2019-10080 as a previous determination and withhold the information subject to that ruling, which we have marked, in accordance with that ruling.³ See Open Records Decision No. 673 (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).

Section 552.103 of the Government Code provides 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). 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 (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. *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 under section 552.103(a).

³As our ruling is dispositive, we need not address your arguments against disclosure of this information.

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. We note contested cases conducted under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103 of the Government Code. See Open Records Decision No. 588 at 7 (1991).

You state the remaining information you have marked relates to a complaint filed against a notary public and investigated by the secretary of state’s office. You state the secretary of state’s office sent a notice of intent to revoke the commission of the notary at issue and the notary subsequently sought a hearing before the State Office of Administrative Hearings (“SOAH”). We note a contested case hearing before the SOAH is considered litigation for the purposes of section 552.103. See *id.* You state, as of the date of the instant request, the decision on this proposed revocation remaining pending. Based on your representations and our review, we find litigation was pending when the secretary of state’s office received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, we conclude the secretary of state’s office may withhold the remaining information you have marked under section 552.103 of the Government Code.⁴

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; 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. See Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 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.* 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. *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) 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 you have marked consists of communications between secretary of state’s office attorneys and employees and officials of the secretary of state’s office that were made for the purpose of providing legal services to the secretary of state’s office. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the remaining information you have marked consists of privileged attorney-client communications the secretary of state’s office may generally withhold under section 552.107(1) of the Government Code.⁵ We note, however, one of these otherwise privileged e-mail strings includes e-mails and attachments received from or sent to parties you have not demonstrated are privileged. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties are removed from the otherwise privileged e-mail string in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the secretary of state’s office separate and apart from the otherwise privileged e-mail string in

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

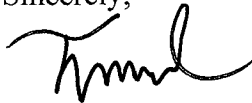
which they appear, then the secretary of state's office may not withhold these non-privileged e-mails and attachments under section 552.107(1).

In summary, the secretary of state's office may rely on Open Records Letter No. 2019-10080 as a previous determination and withhold the information subject to that ruling, which we have marked, in accordance with that ruling. The secretary of state's office may withhold the remaining information you have marked under section 552.103 of the Government Code. The secretary of state's office may generally withhold the remaining information you have marked under section 552.107(1) of the Government Code; however, the secretary of state's office may not withhold the marked non-privileged e-mails and attachments if they are maintained separate and apart from the otherwise privileged e-mail string in which they appear. In that case, the secretary of state's office must release the marked non-privileged e-mails and attachments.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/eb

Ref: ID# 762164

Enc. Submitted documents

c: Requestor
(w/o enclosures)