



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 16, 2019

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

OR2019-13156

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# 765574.

The Office of the Secretary of State (the "secretary's office") received a request for the Secretary of State's calendars. You state the secretary's office released some information to the requestor. You state the secretary's office will withhold information under section 552.136(c) of the Government Code.¹ You claim part of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

¹Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

Initially, you argue part of the submitted information is not subject to the Act. The Act is applicable only to “public information.” See Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002. Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). We understand the secretary’s office allows for incidental use of resources by employees and officials and that the use of secretary’s office resources to create and maintain the information at issue was *de minimis*. See Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). You assert the calendar entry you marked is not related to the Secretary of State’s official business, nor is the entry collected, assembled, or maintained in connection with the transaction of official business. Upon review, we agree the information you marked does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the secretary’s office. See Gov’t Code § 552.002. Thus, we find the calendar entry you marked is not subject to the Act and need not be released in response to the present request for information.

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.

Id. § 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).

You state, and provide documentation demonstrating, a lawsuit styled *Texas League of United Latin American Citizens v. Whitley*, Cause No. 5:19-cv-00074-FB, was pending against the secretary's office in the United States District Court of the Western District Texas, when it received the instant request for information. You also state, and also provide documentation demonstrating, lawsuits styled *Garibay v. Whitley*, Cause No. 2:19-cv-00040, and *MOVE Texas Civil Fund v. Whitley*, Cause No. 3:19-cv-00041, were pending against the secretary's office in the United States District Court of the Southern District of Texas when the secretary's office received the instant request. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the secretary's office received this request for information, and the information you marked is related to the pending litigation for the purposes of section 552.103. Therefore, the secretary's office may withhold the information you marked under section 552.103(a) of the Government Code.²

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further,

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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).

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. *See* 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 “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 information you marked relates to communications between the Secretary of State, secretary’s office officials, secretary’s office employees, secretary’s office attorneys, and other privileged parties made for the purpose of providing legal services to the secretary’s office. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the information you marked consists of privileged attorney-client communications. Therefore, the secretary’s office may withhold the information you marked under section 552.107(1) of the Government Code.

In summary, the calendar entry you marked is not subject to the Act and need not be released in response to the present request for information. The secretary's office may withhold the information you marked under section 552.103(a) of the Government Code. The secretary's office may withhold the information you marked under section 552.107(1) of the Government Code. The secretary's office must release the remaining information.

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,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/gw

Ref: ID# 765574

Enc. Submitted documents

c: Requestor
(w/o enclosures)