



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 22, 2019

Ms. Yvette T. Yarbrough
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2019-19933

Dear Ms. Yarbrough:

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# 776451 (Reference No. 29934).

The Texas Medical Board (the "board") received a request for specified communications during a defined period of time.¹ The board states it does not have some of the requested information.² The board also states it will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101,

¹We note the board sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). Additionally, you state the board office sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the board received the required deposit on May 1, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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.³

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. EVID. 503(b). 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 claim the submitted information is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving the board's attorneys and board employees. You states the communications were made for the purpose of facilitating the rendition of professional legal services to the board and that these

³We 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.

communications 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. Thus, the board may generally withhold the submitted information under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged e-mail strings include e-mails received from non-privileged parties. Furthermore, if the e-mails received from the 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 board separate and apart from the otherwise privileged e-mail strings in which they appear, then the board may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mail exists separate and apart, we will consider your argument under section 552.111 of the Government Code. Section 552.111 of the Government Code 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. Open Records Decision No. 677 at 4-8 (2002); see *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). 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)(1)-(2). 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . 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.

The board contends the information at issue consists of attorney work product. However, as previously noted, the information at issue consists of information that was received from non-privileged parties. Therefore, because non-privileged parties had access to this information, we find the board has failed to demonstrate the applicability of the attorney work product privilege to the information at issue. Accordingly, the board may not withhold any of the remaining information at issue as attorney work product under section 552.111 of the Government Code.

Section 552.103 of the Government Code provides, in relevant part, 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 section 552.103(a) 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. *See 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). *See* ORD 551 at 4. We note contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (“SOAH”) is considered litigation for the purposes of the APA. *See id.*

You state the remaining information, to the extent this information is maintained by the board separate and apart from the otherwise privileged e-mail strings in which it appears, is excepted from disclosure under section 552.103 of the Government Code. You also state, and provide documentation showing, that on the date the board received the instant request for information, the board was a party to two pending hearings before SOAH, SOAH Docket Nos. 503-17-5887.MD and 503-19-3351. Further, you state the information at issue is related to the pending litigation. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the board received the request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103.

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

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses sections 164.007(c) and 601.275 of the Occupations Code. Section 164.007(c) provides:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occ. Code § 164.007(c). Upon review, we find you have failed to demonstrate the remaining information at issue consists of a complaint, adverse report, investigation file, other investigation report, or other investigative information for purposes of section 164.007(c). Furthermore, the remaining information at issue does not include information relating to the

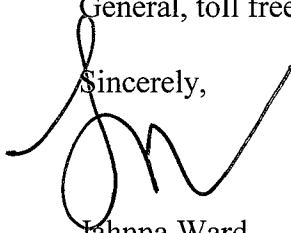
identity of, or a report made by, a physician performing or supervising compliance monitoring for the board. Therefore, the remaining information is not confidential under section 164.007 of the Occupations Code, and the board may not withhold it under section 552.101 of the Government Code on that basis.

In summary, the board may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the non-privileged e-mails, which we have marked, are maintained by the board separate and apart from the otherwise privileged e-mail strings in which they appear, then the board may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The board may withhold the information we have marked under section 552.103 of the Government Code. The board 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,



Jahna Ward
Assistant Attorney General
Open Records Division

JW/gw

Ref: ID# 776451

Enc. Submitted documents

c: Requestor
(w/o enclosures)