



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2020

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2020-05049

Dear Ms. Downey:

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# 811970 (PIR Nos. R002857, R002933, R002958, R003015, R003073, R003081, R003143, and R003155).

The Office of the Attorney General (the "OAG") received eight requests from the same requestor for information pertaining to a specified company. The OAG states it will release some of the requested information with redactions allowed by law. Additionally, the OAG states it will rely on Open Records Letter No. 2020-02580 (2020) as a previous determination and release or withhold some of the requested information in accordance with that ruling. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). The OAG claims some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code exempts 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 section 15.10(i)(l) of the Business and Commerce Code, which reads as follows:

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i)(1). The OAG explains section 15.10(b) of the Business and Commerce Code authorizes the OAG to issue a Civil Investigative Demand (“CID”) when the attorney general has reason to believe any person may be in possession, custody, or control of any documentary material or may have information relevant to a civil antitrust investigation. *Id.* § 15.10(b). The OAG asserts the information at issue consists of information provided to the OAG in response to a CID issued by the OAG’s Antitrust Division. The OAG represents none of the permitted disclosures in section 15.10(i) apply in this instance. After review of the information at issue and consideration of the OAG’s arguments, we agree the OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 15.10(i)(l) of the Business and Commerce Code.

Section 552.101 of the Government Code also encompasses section 17.61(f) of the Business and Commerce Code, which provides, in part:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the office of the attorney general without the consent of the person who produced the material. The office of the attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

Id. § 17.61(f). This provision requires the OAG to withhold from required public disclosure all documentary material the OAG obtained pursuant to a CID. The OAG explains its Consumer Protection Division (the “CPD”) issued a CID to the named company under section 17.61(a) of the Business and Commerce Code. The OAG informs us the company complied by providing the information at issue to the OAG. Thus, we agree the OAG must withhold information it marked under section 552.101 because it is information obtained pursuant to a CID and, therefore, is confidential under section 17.61(f).

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). The 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation might 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.

The OAG states the CPD is investigating activity that may constitute violations of the Texas Deceptive Trade Practices – Consumer Protection Act. The OAG further states the CPD initiated the investigation at issue for enforcement purposes. The OAG states if the CPD uncovers violations of law during this investigation, the OAG will initiate enforcement proceedings and, therefore, anticipates litigation in this matter. Therefore, we find the OAG reasonably anticipated litigation when it received the present request for information. The OAG asserts, and we agree, the information at issue relates to the anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 to the

information at issue and may withhold the information it marked under section 552.103 of the Government Code.

However, once the information has been obtained by all parties to the pending or 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 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. *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. *See* 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. *See 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. *See* 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. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.*, 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).

The OAG states the information at issue consists of or reveals communications between OAG staff and attorneys regarding the handling of public information requests. The OAG states the communications were made for the purpose of providing professional legal services to the OAG. Further, the OAG states these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the

information at issue. Thus, the OAG may withhold the information it marked under section 552.107(1) of the Government Code.

In summary, the OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code. The OAG must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code. The OAG may withhold the information it marked under section 552.103 of the Government Code. The OAG may withhold the information it marked under section 552.103 of the Government Code. The OAG may withhold the information it marked under section 552.107(1) of the Government Code. The OAG 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/eb

Ref: ID# 811970

Enc. Submitted documents

c: Requestor
(w/o enclosures)