



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 2, 2020

Mr. Joseph Behnke
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2020-15070

Dear Mr. Behnke:

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# 831529 (OOG ID# 109-20).

The Office of the Governor (the "governor's office") received a request for documents related to communications between the governor's office and the Guadalupe-Blanco River Authority (the "GBRA") pertaining to a particular subject. You inform us the governor's office will release some information. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state the governor's office has notified the GBRA of the right to submit comments to this office as to why the submitted information should not be released. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We received and considered comments from the GBRA. We have reviewed the submitted arguments and the submitted representative sample of information.¹

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.

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

...

(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).

The GBRA asserts some of the submitted information is related to pending litigation against the GBRA. The GBRA states, and provides documentation showing, prior to the governor's office's receipt of the instant request, lawsuits styled *Skonnard v. Guadalupe-Blanco River Authority*, Cause No. 19-2053-CV; and *Williams v. Guadalupe-Blanco River Authority*, Cause No. 19-2054-CV were pending against the GBRA in the 25th Judicial District Court of Guadalupe County, Texas. The GBRA states the information at issue is related to the pending lawsuits. Based on these representations, the submitted documentation, and our review of the information at issue, we find litigation was pending against the GBRA when the governor'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, the governor's office may withhold the information at issue, which we have marked, under section 552.103(a) of the Government Code on behalf of the GBRA.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, 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

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

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, 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 marked consists of communications involving an attorney for the governor’s office and governor’s office staff made for the purpose of the rendition of legal services to the governor’s office. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find you have established the information at issue consists of privileged attorney-client communications. Thus, the governor’s office may withhold the remaining information it marked under section 552.107(1) of the Government Code.³

In summary, the governor’s office may withhold the information we have marked under section 552.103(a) of the Government Code on behalf of the GBRA. The governor’s office may withhold the remaining information it marked under section 552.107(1) of the Government Code. The governor’s office must release the remaining information.⁴

³ As our ruling is dispositive, we need not address the remaining argument against disclosure of the submitted information.

⁴ We note the information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See Gov’t Code* § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the governor’s office receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the governor’s office to redact the requestor’s e-mail address without the necessity of requesting an attorney general decision.

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/rm

Ref: ID# 831529

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)