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ATTORNEY GENERAL OF TEXAS

September 10, 2020

Ms. Mia Settle Vinson
Open Records Attorney
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2020-22904

Dear Ms. Vinson:

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# 842716 (TDLR# PIR-202003126).

The Texas Department of Licensing and Regulation (the "department") received a request for communications between parties, including department staff and witnesses, relating to a specified State Office of Administrative Hearings ("SOAH") case and specified department enforcement case files.¹ The department states it will release some information. The department claims the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted representative sample of information.² Initially, the department informs us a portion of the responsive information was the subject of a previous ruling from this office. In Open Records Letter No. 2020-17239 (2020), this office ruled the department may withhold the information at issue under section 552.107 of

¹ The department states it 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² 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.

the Government Code. We have no indication the law, facts, or circumstances upon which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon, the department may continue to rely on Open Records Letter No. 2020-17239 as a previous determination and withhold the previously ruled upon information in accordance with it. *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). However, to the extent the information in the current request is not encompassed by the prior ruling, we will consider the exception you raise.

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). 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).

The department states, prior to the receipt of the instant request, it opened enforcement cases relating to alleged violations of statutory and administrative rule violations against the requestor as respondent. The department explains prior to its receipt of the request for

information, the department had contacted the requestor to schedule the matter to be heard before SOAH under the APA. Based on the department's representations and our review, we find litigation was reasonably anticipated when the department received this request for information, and the submitted information is related to the pending litigation for the purposes of section 552.103. Accordingly, the department may generally withhold the submitted information under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation though discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). We note the requestor has seen or had access to some of the information at issue. Accordingly, this information may not be withheld under section 552.103. Thus, we will address your remaining argument against disclosure of this information.

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)(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.*, 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).

We note the remaining information consists of communications to which the requestor is a party that are part of e-mail strings the department states consist of communications involving department enforcement division attorneys and legal staff that were made in furtherance of the rendition of professional legal services to the department. The department states these e-mail strings are confidential, and the department does not indicate it has waived the confidentiality of the information at issue. Based on the department's representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to the e-mail strings at issue, and may generally withhold them under section 552.107(1) of the Government Code. However, as previously noted, the privileged e-mail strings at issue include communications involving the requestor, a non-privileged party. Furthermore, if these communications are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the department maintains the non-privileged communications, which we have indicated, separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged communications are not excepted under section 552.107(1) of the Government Code, and the department may not withhold them on that basis.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note the requestor has a right of access to his own email address under section 552.137(b). *See id.* § 552.137(b). In the event the non-privileged communications are maintained separate and apart, these communications also contain e-mail addresses subject to section 552.137 of the Government Code. The e-mail addresses at issue, which we have indicated, are not of a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the department must withhold the e-mail addresses we have indicated under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

To summarize, with the exception of the information seen by the opposing party, the department may withhold the submitted information under section 552.103 of the Government Code. The department may generally withhold the information seen by the opposing party under section 552.107(1) of the Government Code. However, if the department maintains this information, which we have indicated, separate and apart from the otherwise privileged e-mail strings in which it appears, then this non-privileged information is not excepted under section 552.107(1) of the Government Code, and it must be released to the requestor. In releasing this information, the department must withhold the e-mail addresses we have indicated under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

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,

Michael Pearle
Assistant Attorney General
Open Records Division

MP/jm

Ref: ID# 842716

Enc. Submitted documents

c: Requestor
(w/o enclosures)