



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 29, 2020

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

OR2020-24447

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# 846476 (Ref. No. 19-0813).

The Office of the Secretary of State (the “secretary’s office”) received a request for information pertaining to “LiveCheck” verification process.¹ You state the secretary’s office will release some information. You claim some of the submitted information is not subject to the Act. You also argue some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.139 of the Government Code. We have considered the submitted arguments and submitted representative sample of information.²

¹ You state the secretary’s office sought and received clarification of the requested information. *See* Gov’t Code § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed). In response to the clarified request for information, the secretary’s 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 inform us the secretary’s office received the required deposit on July 9, 2020. *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).

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 Post Office Box 12548, Austin, Texas 78711-2548 • (512) 463-2100 • www.texasattorneygeneral.gov

You argue some of the submitted information is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code 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.

Gov’t Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You argue the computer information you marked consists of information used solely as tools for the maintenance, manipulation, or protection of public property and has no other significance. Based on the reasoning in that decision and our review of the information at issue, we determine the information you marked does not constitute public information under section 552.002. Accordingly, the information you marked is not subject to the Act, and the secretary’s office is not required to release this information in response to this request.³

Section 552.103 of the Government Code provides, in relevant part:

- (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.

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.

³ As we are able to make this determination, we need not address your remaining argument against disclosure of this information.

...

(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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, prior to the receipt of the instant request by the secretary's office, a lawsuit styled *Stringer v. Hughes*, No. 5:20-cv-00046-OLG, was pending against the secretary's office in the United States District Court for the Western District of Texas. Additionally, you state, and provide documentation showing, prior to the secretary's office's receipt of the instant request, a lawsuit styled *Veasey v. Abbott*, Case No. 2:13-cv-00193, was pending against the secretary's office in the United States District Court for the Southern District of Texas. Therefore, we agree litigation was pending on the date the secretary's office received the present request for information. You also state the information at issue, which you marked, pertains to the substance of the lawsuits' claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the secretary's office may withhold the information you marked under section 552.103 of the Government Code.⁴

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. *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 been concluded. *See Attorney General Opinion MW-575 (1982); see also 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. *Open Records Decision No. 676 at 6-7 (2002).* First, a governmental body must demonstrate that the information constitutes

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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).

You state the information you marked consists of confidential communications among attorneys for the secretary’s office and employees of the secretary’s office, in their capacities as clients. You state the communications were made in furtherance of the rendition of professional legal services to the secretary’s office and the confidentiality of the communications have been maintained. Based on these representations and our review, we find the secretary’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the secretary’s office may withhold the information you marked under section 552.107(1) of the Government Code.⁵

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

⁵ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency[.]

Id. § 2059.055(b)(1). You assert the information you marked pertains to technical details of the statewide computer system and relates to the design and operation of the system. Further, you state some of the information at issue resides on a secured site. Based on your representations and our review of the information, we conclude the secretary's office must withhold the information we marked under section 552.139 of the Government Code. However, we find you have failed to demonstrate any of the remaining information relates to computer network security, to restricted information under 2059.055, or to the design, operation, or defense of a computer network as contemplated by section 552.139(a). Accordingly, the secretary's office may not withhold any of the remaining information under section 552.139(a) of the Government Code.⁶

In summary, the information you marked is not "public information" for purposes of the Act, and the secretary's office is not required to release it in response to this request. The secretary's office may withhold the information you marked under section 552.103 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 withhold the information we marked under section 552.139 of the Government Code. The secretary's office must release the remaining responsive 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

⁶ As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/mo

Ref: ID# 846476

Enc. Submitted documents

c: Requestors
(w/o enclosures)

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