



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 27, 1998

Mr. Timothy L. Brown
Brown & Potts, L.L.P.
Attorneys and Counselors
401 West 15th Street, Suite 850
Austin, Texas 78701-1665

OR98-0259

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112480.

The Northeast Texas Municipal Water District (the "district") received a request for two invoices concerning legal billings. You claim that all of the documents submitted to this office as attachment 3a and the marked material in attachment 3b in response to this request are excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

In your request to this office, you contend that the request in certain portions is vague and ambiguous. In those instances, a governmental body must make a good faith effort to relate a request to the information which it holds, and where appropriate, ask for a clarification. Open Records Decision No. 561 (1990). In this case, you state that the district has asked the requestor to clarify his request for information, but has not received a response. You therefore seek a ruling on those documents you believe fall within the scope of the request.

We first address your claim that the material in attachment 3a and the yellow-highlighted material in attachment 3b are excepted from disclosure by section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, you explain that the district is currently involved in pending litigation with Pilgrim's Pride Corporation ("Pilgrim's Pride"), the City of Longview, and the Texas Natural Resource Conservation Commission. You represent that the basis and amount of attorneys fees are an issue in one of the pending lawsuits involving Pilgrim's Pride. You also claim that some of the information submitted for our review in attachment 3b relates to the pending litigation with Pilgrim's Pride and to reasonably anticipated litigation with the requestor and a district employee. After reviewing the submitted materials, and based on your representations, we conclude that litigation involving Pilgrim's Pride Corporation is pending and that the information contained in attachment 3a relates to the pending litigation. To the extent that the yellow-highlighted information in attachment 3b relates to the pending litigation with Pilgrim's Pride, the district may withhold this information under section 552.103. However, we do not find that you have demonstrated that litigation is reasonably anticipated concerning the requestor or the district employee. Therefore, the yellow-highlighted information regarding the requestor or the district employee in attachment 3b may not be withheld from the requestor under section 552.103.

Next, we consider your assertion that some of the material in attachment 3b is protected from disclosure by the attorney work product doctrine under sections 552.101 and 552.107 of the Government Code.¹ In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information as attorney work product if the governmental body can show 1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal

¹We note that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or section 552.111. Open Records Decision No. 647 (1996).

theories.” Open Records Decision No. 647 (1996) at 5. You have not made this showing for any of the information contained in the submitted fee bills. Consequently, the district may not withhold any of the information in the fee bills as attorney work product.

We now consider whether section 552.107 protects any of the remaining requested information in attachment 3b. Section 552.107(1) protects information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects the client’s confidential communications to the attorney and the attorney’s legal advice or opinions. Open Records Decision No. 574 (1990) at 5-7. Thus, information in a fee bill may be withheld if it documents confidences of the client or legal advice or opinions rendered to the client or to associated attorneys. *Id.* For example, section 552.107(1) does not except from disclosure the factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. Furthermore, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records Decision Nos. 630 (1994) at 4, 589 (1991) at 2. After reviewing the information for which you claim an exception under section 552.107, we find that some of the material at issue in attachment 3b constitutes client confidences. We have marked the type of information which you may withhold under section 552.107(1).²

Finally, we address your assertion that section 552.101 protects the green-highlighted information submitted for our review. Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy (1) if the information contains highly intimate or embarrassing facts about a person’s private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The identities of the victim and witnesses to the alleged sexual harassment are excepted from disclosure by the common-law invasion of privacy doctrine as applied in *Ellen* and *Industrial Foundation*. You have not identified in your markings for this office the identity of the alleged victim of sexual harassment. However, to the extent that the information which you have marked in green identifies the alleged victim, you may withhold such information from

²The fee bills you submitted contain information about the content of conversations with certain individuals. However, you have not provided information about the identity of these individuals or about whether the conversations were conducted in confidence. Assuming these individuals are representatives of the district, and the conversations were conducted in confidence, the district may withhold such information based on section 552.107(1) as confidential client communications.

disclosure. The remainder of the green-highlighted material submitted for our review is not protected by common-law privacy under section 552.101 of the Government Code and must, therefore, be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 112480

Enclosures: Submitted documents

cc: Mr. James W. Dean
P.O. Box 621
Hughes Springs, Texas 75656
(w/o enclosures)