



August 7, 2001

Mr. Erik T. Dahler
Staff Attorney
University Health System
4502 Medical Drive
San Antonio, Texas 78229-4493

OR2001-3435

Dear Mr. Dahler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150417.

The Bexar County Hospital District d/b/a University Health System (the "system") received a request for eleven categories of information. You indicate that the system does not have information responsive to categories seven and nine.¹ You claim that the requested information is excepted from disclosure under sections 552.103, 552.111, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that Exhibits E-2, E-3, E-4, E-6, and E-11 contain information that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume that 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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3) (emphasis added). Therefore, as prescribed by section 552.022, the completed reports, completed audits, and executed contracts in Exhibits E-2, E-3, E-4, E-6, and E-11, must be released unless they are confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). Therefore, you may not withhold the completed reports, completed audits, and executed contracts in Exhibits E-2, E-3, E-4, E-6, and E-11, under sections 552.103, 552.107 or 552.111 of the Government Code.

Although section 552.107(1) does not protect information that is subject to disclosure under section 552.022, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022" of the Government Code. See *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in question is confidential under Rule 503.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX.R.EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication that was transmitted between privileged parties or that reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, a document containing privileged information is confidential under Rule 503, provided that the client has not waived the privilege and that the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ). As you have not provided any arguments in support of withholding the information at issue under the attorney client privilege, we conclude that you have not demonstrated the applicability of Rule 503 to the documents in Exhibits E-2, E-3, E-4, E-6, and E-11 that are subject to section 552.022. As these documents, which we have marked, may not be withheld under sections 552.103, 552.107, 552.111 or Rule 503, they must be released.

We now address your claimed exceptions with respect to the remaining information in Exhibits E-5, E-6, E-8, and E-10. Section 552.103 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). Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the system must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); *see also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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).

To demonstrate that litigation is reasonably anticipated, the system must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state that, prior to the receipt of the request for information, the system received a letter from an attorney representing a former system employee. You have submitted a copy of this letter, which alleges that the requestor's client was terminated by the system in retaliation for reporting possible violations of state and federal law, alleged failures to properly process requests for reimbursement from private insurance carriers,

alleged conflicts of interests, and potential violations of state purchasing rules. This letter states that the system's conduct with respect to the requestor's client "has been both tortious and in violation of applicable state and federal employment laws and has damaged my client both financially and emotionally." Moreover, this letter makes a demand for payment of three hundred thousand dollars to the requestor's client. Based on your representations and our review of the submitted claim letter, we conclude that you have shown that litigation was reasonably anticipated on the date the system received the request for information. Furthermore, we conclude that the submitted information relates to the anticipated litigation. Accordingly, with the exception of those documents that are subject to section 552.022, the system may withhold the requested information under section 552.103 of the Government Code.³

We note, however, that if the opposing party in the litigation has seen or had access to any of this information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, we note that this ruling addresses only whether the system is required to release the requested information pursuant to chapter 552 of the Government Code. This ruling does not affect the system's responsibility to respond to the requestor's discovery requests. See Gov't Code § 552.005(a).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

³As section 552.103 is dispositive, we need not address your other claimed exceptions.

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 150417

Enc: Submitted documents

c: Mr. Christopher J. McKinney
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(w/o enclosures)