



September 21, 2001

Ms. Suzanne Yashewski  
Staff Attorney  
General Law Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2001-4256

Dear Ms. Yashewski:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152209.

The Texas Natural Resource Conservation Commission (the "commission") received a request for 12 categories of information related to a named former employee. You inform us that the commission will release all responsive information except information responsive to item number five, which seeks "documents reflecting investigation of Mr. Floyd's claim of retaliation....," as well as information that you inform us is not in the possession of the commission. You claim that the information responsive to item number five is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

First, with regard to the information requested which you assert is not in the commission's possession, chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received.

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<sup>1</sup>Although you raise section 552.101, which excepts from disclosure excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," you make no argument for withholding information under this exception. Therefore, as we find no information in the submitted documents that is made confidential by law, we do not address the applicability of section 552.101.

<sup>2</sup>We assume that the "representative samples" of records submitted to this office are 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.

*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). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990).

Next, we note that the submitted information, which you describe as "all documentation related to the investigation of the requestor's internal complaint of discrimination and retaliation," falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides that

*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:*

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1) (emphasis added). Therefore, we find that section 552.022(a)(1) requires the release of the submitted information unless the information is expressly confidential under other law.

Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022(a). See Open Records Decision No. 665 at 2 n.5 (2000) (discussing discretionary exceptions under Gov't Code ch. 552). Therefore, information relating to the completed investigation may not be withheld from disclosure under sections 552.103 or 552.107(1). See also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body), 630 at 7 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)). Therefore, you may not withhold any of the submitted information under sections 552.103 or 552.107.

The attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001). Therefore, we will consider whether any of the information in Attachment G 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. 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).

Thus, 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 transmitted between privileged parties or 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, the document containing privileged information is confidential under rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ).

You assert that the information submitted as Attachment G is within the attorney-client privilege, in that this information represents communications between commission personnel and attorneys made for the purpose of facilitating the rendition of professional legal services to the agency. Upon review of your arguments and the information in Attachment G, we conclude that this information is protected by the attorney-client privilege under Texas Rule of Evidence 503, with the exception of certain information that we have marked.

Finally, we note that Attachment F contains the address of the named former employee. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. However, we also note that section 552.023 of the Government Code gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest. If in fact the attorney in this case is the authorized representative of the named former employee, then the commission must release the information protected by section 552.117.

To conclude, the submitted information is made expressly public under section 552.022(a)(1), and may not be withheld under sections 552.103 or 552.107 of the Government Code. Thus, the commission must release to the requestor all of the information in Attachment F, with the possible exception of the address contained therein. The information in Attachment G may be withheld under Texas Rule of Evidence 503, with the exception of certain information that we have marked.

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 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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref.: ID# 152209

Enc.: Submitted documents

c: Ms. Colleen Hamon  
Law Offices of Ross & Matthews, P.C.  
3650 Lovell Avenue  
Fort Worth, Texas 76107  
(w/o enclosures)