



October 29, 2001

Ms. Julie B. Ross
Karger, Key, Barnes & Springer, L.L.P.
300 West Third Street, Suite 1700
Fort Worth, Texas 76102

OR2001-4940

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154124.

The City of North Richland Hills (the "city"), which you represent, received a request for 26 categories of information, a portion of which relate to a named city employee and the remainder of which relate to certain city policies and procedures. You claim that the requested information is excepted from disclosure in its entirety under section 552.103 of the Government Code, and that a portion of it is also excepted under section 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

At the outset, we must address a certain procedural matter. Section 552.301(b) requires a governmental body to "state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(b). The city received the request on August 10th, 2001. Thus, the tenth business day after that date was August 24, 2001. However, you did not assert the applicability of sections 552.107 until after that date. Thus, the department did not timely comply with section 552.301(b) with respect to the section 552.107 assertion.

If a governmental body fails to request a decision from this office as provided by section 552.301, the information "is presumed to be subject to required public disclosure

¹We 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.

and must be released unless there is a compelling reason to withhold the information.” Gov’t Code § 552.302. *See also Hancock v. State Board of Insurance*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov’t Code § 552.302); Open Records Decision No. 319 (1982). In this case, section 552.107(1) does not constitute a compelling reason to overcome the presumption of openness.² *See, e.g.*, Open Records Decision No. 150 (1977) (compelling reason under section 552.302 demonstrated only where information is confidential by law or its release implicates third party interests). Accordingly, none of the information may be withheld under sections 552.107(1) of the Government Code. However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Rule 503 constitutes a compelling reason to overcome the presumption of openness. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

Next, we note that a portion of the information you submitted to this office as responsive to the request constitutes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See* Gov’t Code §§ 552.022(a)(1) (“a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108”); 552.022(a)(10) (“a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated or adopted by an agency”); 552.022(a)(13) (“a policy statement or interpretation that has been adopted or issued by an agency”); 552.022(a)(14) (“administrative staff manuals and instructions to staff that affect a member of the public”); 552.022(a)(15) (“information regarded as open to the public under an agency’s policies”). The information subject to section 552.022 must therefore be released unless the information is expressly made confidential under other law.

Section 552.103 of the Government Code is a discretionary exception that does not constitute “other law” that makes information confidential for purposes of section 552.022. *See* Open Records Decision Nos. 542 (1990) (“litigation exception” does not implicate third party rights and therefore is waivable by a governmental body). We therefore conclude that the submitted information consisting of job descriptions, the city charter, the city’s civil service rules and regulations, the performance evaluations, and the employee handbook, which we

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body’s position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception), 177 (1977) (section 552.108 is discretionary exception to disclosure that protects governmental body’s interests and may be waived), 522 (1989) (discretionary exceptions in general).

have marked, must be released in their entirety pursuant to section 552.022 of the Government Code.

The submitted information also includes a completed investigation. This investigation must be released under section 552.022(a)(1) unless it is confidential under other law. As noted, section 552.103 is not other law for purposes of section 552.022. However, you also raise the attorney-client privilege to protect this information. As also previously noted, the attorney-client privilege is 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.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

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 layer 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.

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. Tex. R. Evid. 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 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).

Upon review of the documents entitled “Conclusion of Investigation” and “Investigative Report on Issues Not Contained in Original Allegations,” we conclude that these documents, which were prepared at the direction of the city’s attorney and which state on their face that they are not intended to be disclosed to outside parties, are confidential under Rule 503 and must be withheld from the requestor.

We will next address your argument under section 552.103 for the information not made public under section 552.022. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation was pending or reasonably anticipated on the date the request was received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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); Gov’t Code § 552.103. The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You have submitted information demonstrating that the employee whose personnel information has been requested has filed with the Texas Commission on Human Rights (“TCHR”) a discrimination complaint against the city. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission (“EEOC”) defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Thus, you may withhold the requested information not subject to section 552.022 pursuant to section 552.103(a).

However, once information has been made available to all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). It is evident that a large portion of the submitted documents have been seen by the opposing party, whose personnel information is at issue. Therefore, those documents may not be withheld under section 552.103. 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).

We note that the personnel information which has been seen by the opposing party contains information that is protected by common law privacy under section 552.101,³ as well as information that may be protected under section 552.117.⁴ However, the requestor here is the attorney representing the employee whose personnel information is at issue. In this instance, therefore, the requestor has a special right of access to information about his client. *See Gov't Code § 552.023* (person's authorized representative has a special right of access to information that is protected by laws intended to protect person's privacy). Accordingly, you must release to the requestor the submitted information seen by the opposing party.⁵

To summarize, the city must release the documents that we have marked under section 552.022. The city must withhold the information we have marked as coming within the attorney-client privilege under Rule 503 of the Texas Rules of Evidence. As to the remainder of the submitted documents, the city may withhold them under section 552.103, but only to the extent that they have not been seen by the opposing party to the litigation. Documents seen by the opposing party must be released to the requestor.

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

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

⁴Section 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.

⁵Because the information to be released under section 552.023 is confidential with respect to the general public, if the city receives a future request for this information from an individual other than the requestor or his authorized representative, the city should again seek our decision.

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# 154124

Enc: Submitted documents

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