



November 27, 2001

Ms. Karen C. Gladney  
Associate General Counsel  
Texas Association of Counties  
1204 San Antonio  
Austin, Texas 78701

OR2001-5486

Dear Ms. Gladney:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155290.

The Texas Association of Counties (the "association") received a request for copies of various attorney fee bills and other documents. You indicate that you have provided the requestor with some responsive information. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and Rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that Exhibit D and some portions of Exhibit F are encompassed by section 552.022 of the Government Code. Section 552.022 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, except as provided by Section 552.108[;]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1),(16). The "Attorney Suit Reports" in Exhibit F must be released under section 552.022(a)(1), unless they are confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Although you claim that the "Attorney Suit Reports" are excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code, these exceptions are discretionary exceptions to disclosure that do not constitute "other law" for purposes of section 552.022.<sup>1</sup> Accordingly, we do not address your claims with respect to the "Attorney Suit Reports" in Exhibit F under these exceptions to disclosure.

We note, however, that 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*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether the submitted "Attorney Suit Reports" and the highlighted portions of the attorney fee bills are 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 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

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<sup>1</sup> Discretionary 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 governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general).

(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. *See id.* Therefore, in order for information to be withheld 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 information is privileged and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Based on our review of your arguments, the highlighted portions of the attorney fee bills in Exhibit D, and the "Attorney Suit Reports" in Exhibit F, we conclude that you have demonstrated that some of the highlighted portions of the fee bills constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. However, you have not demonstrated that other highlighted portions of the fee bills relate to communications between privileged parties under rule 503. Accordingly, you must release to the requestor the highlighted information in Exhibit D that we have marked, as well as all non-highlighted entries which you do not claim to be privileged. However, you may withhold the remaining highlighted information in Exhibit D from disclosure pursuant to rule 503 of the Texas Rules of Evidence. We also conclude that you may withhold the entirety of the "Attorney Suit Reports" in Exhibit F from disclosure pursuant to rule 503.

You claim that the remaining submitted information in Exhibit F is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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.

....

(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 association bears 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 on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). The association must meet both prongs of this test for information to be excepted under section 552.103(a). You state, and provide documentation showing, that the remaining submitted information in Exhibit F directly relates to two ongoing lawsuits involving the association. Based on our review of your representation and this information, we conclude that you have demonstrated that litigation was pending on the date that the association received the request and that this information is related to that litigation for purposes of section 552.103. Accordingly, we conclude that the association may withhold most of the remaining submitted information in Exhibit F from disclosure pursuant to section 552.103 of the Government Code.

However, we note that 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 the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.<sup>2</sup> We note that one of the submitted documents in Exhibit F, which we have marked, has been obtained from or seen by the opposing parties in one of the pending lawsuits. Accordingly, you may not withhold this document from disclosure under section 552.103 of the Government Code.

However, you also claim that this document is excepted from disclosure pursuant to section 552.107(1) of the Government Code.<sup>3</sup> Section 552.107(1) excepts from disclosure

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<sup>2</sup> 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).

<sup>3</sup> You also claim that this document is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the attorney-client privilege. We note that we address your claim with regard to section 552.101 in the context of the attorney-client privilege under section 552.107 of the Government Code.

information encompassed by the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. *See* Open Records Decision No. 574 at 5 (1990). Based on our review of your arguments and this marked document, we conclude that the document does not constitute an attorney's legal advice or opinion to her client. Accordingly, we conclude that the association may not withhold this document from disclosure pursuant to section 552.107(1) of the Government Code.

However, you also claim that this document is excepted from disclosure as attorney work product pursuant to section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See* Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. Based on our review of this document, we conclude that none of the information contained therein is excepted from disclosure under section 552.111 as attorney work product, since it does not reveal an association attorney's mental processes, conclusions, or legal theories. Accordingly, you must release this document to the requestor.

Finally, you also request that this office issue a previous determination allowing the association to withhold attorney fee bills containing privileged information from disclosure in response to future requests for information without the necessity of seeking a ruling from this office. We decline to issue such a previous determination at this time.

In summary, the association must release to the requestor the highlighted portions of the submitted attorney fee bills in Exhibit D that we have marked, as well as all non-highlighted portions of these bills. The association may withhold the remaining highlighted portions of Exhibit D from disclosure pursuant to rule 503 of the Texas Rules of Evidence. The association may also withhold from disclosure the two "Attorney Suit Reports" in Exhibit F in their entirety pursuant to rule 503. The association must release the document in Exhibit F that we have marked to the requestor. However, the association may withhold the remaining submitted information in Exhibit F pursuant to section 552.103 of the Government Code.

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 Texas Building and Procurement 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 155290

Enc. Marked documents

cc: Mr. Vince Leibowitz  
Editor  
Van Zandt Newspapers, LLC  
103 East Tyler Street  
Canton, Texas 75103  
(w/o enclosures)