



October 10, 2002

Mr. Arthur E. Clayton
Assistant County Attorney
Johnson County
Johnson County Courthouse
2 North Main Street
Cleburne, Texas 76031

OR2002-5745

Dear Mr. Clayton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170490.

The Johnson County Attorney's Office (the "county attorney") received a request for "[a] copy of any letters from the firm/attorneys that represented [Johnson County, (the "county")] and [the requestor] in the federal case filed by K.D. Pool, and the final order on that case or any other court orders concerning the case."¹ You state that the county attorney does not object to the release of the requested court orders, but you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the submitted documents contain information that is subject to section 552.022 of the Government Code, which makes certain information expressly public

¹In his request letter, the requestor also sought information from the county public works department, the county personnel or human resources department, and the county judge and commissioners. This ruling only addresses the request for information held by the county attorney.

and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

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.

Gov't Code § 552.022 (emphasis added). One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108" Gov't Code § 552.022(a)(1). Therefore, as prescribed by section 552.022, this information, which we have marked, must be released to the requestor unless it is confidential under other law or excepted under section 552.108. You do not raise section 552.108. Section 552.107(1), which excepts information that comes within the attorney-client privilege, is a discretionary exception to disclosure and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). Therefore, you may not withhold the information under section 552.107(1).

The attorney-client privilege also is found, however, 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). Thus, we will determine whether the information at issue 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 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Upon review of the reports subject to section 552.022(a)(1), we find that you have established that these reports are protected under the attorney-client privilege, and therefore, they are confidential under Rule 503. With regard to the remainder of the information not subject to section 552.022, we will address your arguments against disclosure.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client.² In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public 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; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Upon review of the submitted information, we conclude that much of this information is protected by the attorney-client privilege and thus may be withheld under section 552.107(1). However, some of the information consists of communications to or from individuals who were not clients of the attorney or representatives of either. This information is not protected by the privilege, and therefore, it may not be withheld under section 552.107(1). For this information, we will address your other arguments against disclosure.

Section 552.103 provides as follows:

²Although you also seek to withhold information subject to the attorney-client privilege under section 552.101, this office ruled in Open Records Decision No. 574 (1990) that the appropriate section for a governmental body to cite when seeking to withhold information of this type was the statutory predecessor to section 552.107.

(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.

The county attorney 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 on the date the governmental body receives the request for information, 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, 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). The county attorney must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." 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.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

³In 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).

In this case, you indicate that the litigation for which the requestor seeks any orders is completed. Thus, we find that litigation is not pending in this matter. You also assert, however, that the requestor is gathering information to be used against the county, that he resigned his position as public works director following the entering of final orders in the aforementioned litigation, that the statute of limitations as to any act arising from his employment has not run, and that future litigation may occur. Finally, you express your opinion that the requestor is seeking information for purposes of a "fishing expedition" in order to bring suit against the county. Having considered your arguments under section 552.103, however, we conclude that you have not established through concrete evidence that the county reasonably anticipates litigation with the requestor for purposes of section 552.103. Therefore, the county attorney may not withhold any of the remaining information under section 552.103.

Next, we will address your argument under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." 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. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was 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 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. 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.

For the information that we find is not excepted from disclosure under section 552.107 consisting of correspondence to and from opposing parties in the litigation as well as court personnel, we find you have not demonstrated how this information reveal the attorney's mental processes, conclusions, and legal theories. Therefore, this information may not be withheld under section 552.111 as attorney work product.

Finally, you argue that the records at issue are excepted in their entirety under article 39.14 of the Code of Criminal Procedure. Article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings, and permits inspection of the State's evidence in limited circumstances and in the presence of a representative of the State. This office has determined that to fall within section 552.101,⁴ a statute must explicitly require

⁴Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

confidentiality; confidentiality will not be inferred. *See* Open Records Decision No. 465 (1987). *See also* Open Records Decision Nos. 575 (1990), 574 (1990) (discovery privileges do not make information confidential for purposes of statutory predecessor to section 552.101).⁵ The procedure you raise concerns procedures and rules for court proceedings. Article 39.14 does not make information expressly confidential. Accordingly, the department may not withhold any of the submitted information under section 552.101 in conjunction with article 39.14 of the Code of Criminal Procedure.

To summarize, the county attorney may withhold most of the information under section 552.107 and Rule 503. The remaining information must be released to the requestor. We have marked the information to be released.

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).

⁵We note that the Texas Supreme Court recently held that rules under the Texas Rules of Civil Procedure and Texas Rules of Evidence that expressly make information confidential are "other law" within the meaning of section 552.022. *In Re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, here the information at issue is not subject to section 552.022.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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/jh

Ref: ID# 170490

Enc: Submitted documents

c: Mr. William Nelson
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(w/o enclosures)