



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 22, 2008

Ms. Zindia T. Thomas  
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Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2008-07073

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 310854.

The Office of the Attorney General (the "OAG") received a request for correspondence between November 1, 2007 and March 5, 2008 among OAG employees that reference Dallas County District Judges David Hanschen and Lynn Cherry. The OAG states it will release some of the responsive information. However, the OAG seeks to withhold the remaining information from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code.<sup>1</sup> We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.<sup>2</sup>

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<sup>1</sup>The OAG asserts the information is protected under section 552.101 of the Government Code in conjunction with the attorney-client privilege pursuant to Texas Rule of Evidence 503 and the attorney work product privilege pursuant to Texas Rule of Civil Procedure 192.5. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass the discovery privileges found in these rules because they are not constitutional law, statutory laws, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002). The OAG's reliance on *In re City of Georgetown* is misplaced because the court addressed the interplay between the discovery privileges and section 552.022 of the Government Code, not section 552.101. 53 S.W.2d 328 (Tex. 2001).

<sup>2</sup>We 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.

First, you inform this office some of the requested information was released to the requestor without the OAG's permission. The Act does not permit the selective disclosure of information to the public. See Gov't Code §§ 552.007, .021; Open Records Decision No. 463 at 1-2 (1987). If a governmental body voluntarily releases information to a member of the public, such information may not later be withheld unless its disclosure is expressly prohibited by law. See Gov't Code § 552.007. However, the Act does not preclude a governmental body from invoking the Act's exceptions to protect from further public disclosure information which has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body. See Open Records Decision No. 387 (1983). Because the OAG states it did not voluntarily release this information to the requestor, we conclude the OAG did not waive its claim under section 552.107. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Second, we note Exhibit D includes documents that have been filed with a court. Information that is also contained in a public court record is public information and not excepted from disclosure unless the information is expressly confidential under law. Gov't Code § 552.022(a)(17). Sections 552.103, 552.107, and 552.111 are discretionary exceptions and do not make information confidential; therefore, the OAG may not withhold the court records under these exceptions. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 473 (1987) (sections 552.103 and 552.111 may be waived). These documents must therefore be released unless they are expressly made confidential under other law.

The attorney-client and attorney work product privileges are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. 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 OAG may withhold the court records 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

(D) 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

The court records subject to section 552.022(a)(17) are part of privileged communications between OAG attorneys made in furtherance of the rendition of legal services. The OAG explains the communications were intended to be confidential and that their confidentiality has been maintained. Thus, the OAG may withhold the court records under Rule 503.<sup>3</sup>

Section 552.103, the litigation exception, provides in relevant part 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.

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<sup>3</sup>Because Rule 503 is dispositive, we do not address the OAG's other arguments for these records.

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(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 OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 OAG must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

In this instance, the OAG explains that before its receipt of the request for information, it was preparing to file a writ of mandamus against Dallas County judges in a matter concerning the deposit of child support payments. The OAG also states the information relates to this anticipated litigation. After reviewing the OAG’s arguments and the submitted records, we conclude the requested information relates to the OAG’s anticipated litigation. Thus, the OAG may withhold Exhibits C and D under section 552.103. Because section 552.103 is dispositive of the information in these exhibits, we do not address the OAG’s other arguments for Exhibits C and D.

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. 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 it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we consider the OAG's section 552.107 assertion for Exhibit E. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). The elements of the privilege under section 552.107 are the same as those for Rule 503 outlined above.

The OAG explains the communications in Exhibit E are confidential communications among OAG attorneys and staff, and they are made in furtherance of the rendition of professional legal services. The OAG states the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG's arguments and the submitted information, we agree the communications in Exhibit E constitute privileged attorney-client communications that the OAG may withhold under section 552.107.<sup>4</sup>

Lastly, the OAG marks some e-mail addresses in Exhibit B as confidential under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Gov't Code § 552.137(a), (b). We note, however, that section 552.137 does not apply to the work e-mail address of an officer or employee of a governmental body. Thus, the OAG must withhold the private e-mail addresses it and we marked in Exhibit B pursuant to section 552.137 unless the individuals at issue affirmatively consented to the release of their e-mail addresses. However, the OAG must release the governmental e-mail address we marked.

In summary, the OAG must withhold the private e-mail addresses it and we marked in Exhibit B pursuant to section 552.137 unless the individuals at issue affirmatively consented to the release of their e-mail addresses. The OAG must release the remainder of Exhibit B. The OAG may withhold the court records subject to section 552.022(a)(17) under Texas Rule of Evidence 503. Lastly, the OAG may withhold Exhibits C and D under section 552.103 of the Government Code and Exhibit E under section 552.107 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of

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<sup>4</sup>Because section 552.107 is dispositive, we do not address the OAG's other assertions for Exhibit E.

such a challenge, 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).

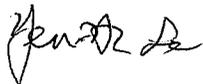
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. 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 Office of the Attorney General 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 310854

Enc: Marked documents

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