



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2010

Ms. Margo M. Kaiser
Staff Attorney
Open Records Unit
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2010-07584

Dear Ms. Kaiser:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 380699 (TWC Tracking No. 100309-037).

The Texas Workforce Commission (the "commission") received a request for a named individual's personnel file and for information pertaining to an investigation that was performed during a specified time period. You state that you have released some information to the requestor, including the requested personnel file. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.137, and 552.139 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 states in relevant part:

- (a) 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:

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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Upon review, we find the submitted information contains two completed reports made by the commission. Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you raise sections 552.103 and 552.107 of the Government Code for the two reports at issue, these are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022(a)(1). Therefore, the commission may not withhold either of these reports under sections 552.103 or 552.107 of the Government Code. However, you also seek to withhold one of the reports under rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the 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). Moreover, you raise section 552.139 of the Government Code for both reports, which is other law for purposes of section 552.022. Accordingly, we will consider your assertion under rule 503 of the Texas Rules of Evidence for the report you have marked as "attorney-client," as well as your arguments under section 552.139 for both reports. Additionally, we will consider your claims under sections 552.103 and 552.107 for the portions of the submitted information not subject to section 552.022(a)(1).

You claim one of the reports that is subject to section 552.022(a)(1) is excepted from disclosure under rule 503 of the Texas Rules of Evidence. Rule 503 encompasses the attorney-client privilege and 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

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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).

You state the report subject to section 552.022 that you have marked as “attorney/client” consists of a communication between attorneys for the commission and commission employees. You indicate the communication was made for the purpose of facilitating the rendition of professional legal services to the commission. You also indicate this communication was made in confidence and that its confidentiality has been maintained. Moreover, you state the report at issue includes notes of legal analysis and advice made by an attorney at the time of, or in anticipation of, an oral briefing of staff. Based on your representations and our review, we agree the report at issue, which we have marked, constitutes a privileged attorney-client communication the commission may withhold under rule 503 of the Texas Rules of Evidence.²

Next, you raise section 552.139 of the Government Code for the remaining report subject to section 552.022. Section 552.139 provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

²As our ruling is dispositive, we do not address your remaining claim against disclosure of this information.

- (1) a computer network vulnerability report; and
- (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use.

...

Gov't Code § 552.139(a), (b). We note the information at issue is a report detailing the internet usage of a commission employee. Accordingly, we find you have failed to demonstrate the report at issue relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055 (defining confidential network information for purposes of section 2059.055). Furthermore, you have not demonstrated the report at issue consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, the report at issue may not be withheld under section 552.139 of the Government Code. As you raise no further arguments for the remaining report subject to section 552.022, it must be released.

You claim the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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.

...

- (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 commission has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for

information, 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 commission must meet both prongs of this test for information to be excepted under section 552.103.

This office has long held that for the purposes of section 552.103, “litigation” includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, “contested cases” conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute “litigation” for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

You state that the remaining information pertains to a grievance filed against the commission by the requestor. You explain that hearings resulting from grievances filed with the commission are “litigation” in that the commission follows administrative procedures in handling such disputes. You indicate, and provide documentation showing, the commission’s grievance policy includes a four-step process wherein a commission hearing officer hears the grievance in a closed hearing and then presents his or her findings to the commission’s Executive Director, whom renders a decision. You explain that during these hearings, the parties may request the issuance of subpoenas and are required to exchange documents and witness lists up to five working days before the hearing. You further state that in the hearings, factual questions are resolved and a record is made. We also note that according to the submitted documentation, the parties may be represented by counsel, witnesses may be required to testify under oath, and the hearing officer may subpoena witnesses and documents and is the judge of the relevance and materiality of the evidence. Based on your representations and our review of the submitted information, we find that the pending grievance hearing constitutes litigation for the purposes of section 552.103 of the Government Code. We also find the information at issue pertains to the employee who is subject of the grievance hearing and therefore relates to the pending litigation for purposes of section 552.103. Therefore, we conclude the commission may withhold the remaining information under section 552.103 of the Government Code.³

However, we note that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect

³As our ruling is dispositive, we do not address your remaining arguments for this information.

to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and 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).

In summary, the commission may withhold the report we have marked under rule 503 of the Texas Rules of Evidence. The commission must release the report we have marked under section 552.022(a)(1) of the Government Code. The commission may withhold the remaining information under section 552.103 of the Government Code.⁴

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 380699

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023 (person has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests). Thus, if the commission receives another request for this particular information from a different requestor, then the commission should again seek a decision from this office.