



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 4, 2010

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2010-08106

Dear Mr. Smith:

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# 381752 (OR# 20100318-5008).

The Texas Health and Human Services Commission (the "commission") received a request for: 1) any correspondence between two named individuals and the commission's Office of Civil Rights during a specified time period and 2) any correspondence between these individuals and the Office of Civil Rights regarding a specified case number. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note you have submitted information that does not consist of communications between the two individuals named in the request and the Office of Civil Rights. Accordingly, this information, which we have marked, is not responsive to the present request for information. The commission need not release non-responsive information in response to this request, and this ruling will not address the public availability of this information.

Next, we address the requestor's argument that the commission has previously disclosed the Management Initiated Investigation ("MII") report submitted as Exhibit C. The requestor contends "by releasing the [MII report] to the 'public at large'. . . the document and its supporting information are no longer protected and are therefore available without redaction." Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the commission may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. However, section 552.007 does not prohibit an agency from withholding related documents that do not consist of the exact information. We note the requestor contends that only the MII report was released. Therefore, we will address the commission's arguments for the remaining responsive information. Furthermore, the commission claims that portions of the submitted MII report are excepted from disclosure under sections 552.101 and 552.117, which make information confidential by law for purposes of section 552.007. *See Gov't Code* §§ 552.101, .117; *see also* Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Thus, regardless of whether the submitted report has been previously released, we must address whether any portion of the report is made confidential by law and must now be withheld pursuant to sections 552.101 and 552.117 of the Government Code.

You raise section 552.101 of the Government Code for portions of Exhibit C. 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find a portion of Exhibit C is highly intimate or embarrassing and not of legitimate interest to the public. Thus, the commission must withhold the information we have marked under section 552.101 in conjunction with

common-law privacy. However, none of the remaining information is highly intimate or embarrassing and not of legitimate public interest, and the commission may not withhold it under section 552.101 on the basis of common-law privacy.

You also raise section 552.117 of the Government Code for some of the remaining information in Exhibit C. Section 552.117(a)(1) excepts from public disclosure the present and former home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests that such information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). The commission may only withhold information under section 552.117(a)(1) on behalf of an employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You state the employees whose information is at issue timely elected confidentiality for their information under section 552.024. Thus, the commission must withhold the information we have marked in Exhibit C under section 552.117(a)(1) of the Government Code.

Next, you raise section 552.107 of the Government responsive information within Exhibit B and a portion of the responsive information in Exhibit D. Section 552.107 protects information within the attorney-client privilege. Gov't Code § 552.107. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, you assert the responsive information within Exhibit B and a portion of the responsive information in Exhibit D consist of communications between commission staff, Texas Department of State Health Services (“DSHS”) attorneys, and DSHS staff. We understand the commission is the umbrella agency for DSHS. Further, you explain the commission staff, DSHS attorneys, and DSHS staff at issue coordinate their efforts in the area of personnel and employment matters. *See Gov’t Code* § 531.0055(d)-(f). You contend the information at issue consists of communications that were made for the purpose of rendering professional legal services. You also state the confidentiality of these communications has been maintained. Based on your representations and our review of the information at issue, we conclude the commission may withhold the responsive information in Exhibit B and a portion of the responsive information in Exhibit D, which we have marked, under section 552.107(1) of the Government Code.

You raise section 552.103 of the Government Code for the remaining responsive information in Exhibit D. Section 552.103 provides 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(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 received the request, 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 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found that a pending EEOC complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981). 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. *See* Open Records Decision No. 331 (1982).

You argue that the remaining responsive information in Exhibit D is excepted under section 552.103 because the commission anticipates litigation from the requestor. You state and provide documentation showing that the requestor filed a complaint with the EEOC against the commission. We note, however, that the present request was received by the commission prior to the requestor's EEOC filing. Further, you do not provide any additional arguments as to how the commission anticipated litigation from the requestor prior to the commission's receipt of the request. *See* Gov't Code § 552.301(e)(1)(A) (governmental body has the burden of proving that the requested information must be withheld under the stated exception). Consequently, you have not established the commission reasonably anticipated litigation when it received the request for information. Accordingly, the commission may not withhold the remaining responsive information in Exhibit D under section 552.103 of the Government Code.

In summary, the commission must withhold the information we have marked in Exhibit C under (1) section 552.101 of the Government Code in conjunction with common-law privacy and (2) section 552.117(a)(1) of the Government Code. The commission may withhold the responsive information in Exhibit B and a portion of the responsive information in Exhibit D, which we have marked, under section 552.107(1) of the Government Code. The remaining information must be released.

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](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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/eeg

Ref: ID# 381752

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)