



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2010

Mr. Augustin Rivera, Jr.
Dunn, Weathered, Coffey, Rivera & Kasperitis, P.C.
611 South Upper Broadway
Corpus Christi, Texas 78401

Mr. William Christian
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701

OR2010-13434

Dear Mr. Rivera and Mr. Christian:

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# 392481.

The Del Mar College District (the "college"), which you represent, received two requests from the same requestor for several categories of information created during specified time periods. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). In this instance, the information you claim is protected under the attorney-client privilege based on Texas Rule of Evidence 503 is properly addressed here under section 552.107. ORD 676 at 3.

²We assume that the "representative sample" of information 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.

Initially, we note that a portion of the submitted information may have been subject to a previous request for information, in response to which this office issued Open Records Letter No. 2010-06373 (2010). In that decision, we ruled, among other things, that the college may withhold portions of the information at issue under section 552.107 of the Government Code. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the college may continue to rely on that ruling as a previous determination and withhold or release any previously ruled upon information in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not previously ruled upon, we will consider your arguments against disclosure.

Next, we note the requestor claims three of the submitted letters, which we have marked, were previously released to the public. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). *But see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). Accordingly, the city may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. You assert the requested information is excepted under sections 552.103 and 552.107 of the Government Code. These sections, however, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 neither prohibit public disclosure of information nor make information confidential under law. Therefore, if the college previously released the letters at issue, the letters may not be withheld from the present requestor under either section 552.103 or section 552.107. Conversely, if the college has not previously released the letters at issue, we will consider the applicability of sections 552.103 and 552.107 to the information at issue.

Section 552.103 of the Government Code provides in relevant 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 governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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 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. at 4 (1990). The governmental body 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 section 552.103 and that litigation is "reasonably likely to result").

You state, and have provided documentation showing, that prior to the college's receipt of the request, a lawsuit styled *Bruce Olson v. Del Mar College District*, D-1-GN-10-001381, was filed and is currently pending in the 126th Judicial District Court in Travis County, Texas. Therefore, we agree that litigation was pending on the date the college received the present request for information. Further, you state that the submitted information is related to the lawsuit pending before the court. Based on your representations and our review, we find the college reasonably anticipated litigation on the date the college received the request for information. We also find the responsive information is related to the anticipated

litigation. Accordingly, we find section 552.103 is generally applicable to the submitted responsive information.³

We note, however, that once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (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, and it must be disclosed. In this instance, a portion of the submitted information, which we have marked, has been provided to the opposing party to the anticipated litigation. Therefore, the information we have marked may not be withheld under section 552.103. However, the remaining information at issue may be withheld under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We note the information we have marked for release contains information that may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from public disclosure the 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 requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Accordingly, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the college must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the college may continue to rely on Open Records Letter No. 2010-06373 (2010) as a previous determination and withhold or release the information in accordance with that ruling. With the exception of the information that has been previously released to the public or provided to the opposing party to the anticipated litigation, the college may withhold the submitted information under section 552.103 of the Government Code. In releasing information that has been previously released to the public or provided to the opposing party, the college must withhold the information we have marked under

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(1) of the Government Code, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 392481

Enc. Submitted documents

c: Requestor
(w/o enclosures)