



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2010

Mr. J. Greg Hudson
Hudson & O'Leary, L.L.P.
1010 Mopac Circle, Suite 201
Austin, Texas 78746

OR2010-17936

Dear Mr. Hudson:

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# 401305.

The Montgomery County Hospital District (the "district"), which you represent, received a request for personnel records pertaining to the requestor and two named employees, information pertaining to a specified charge of assault, specified e-mail communications over a specified time period, an e-mail server log for a specified period of time, and records of drive cam incidents involving the requestor.¹ You indicate the district does not have any information responsive to portions of the request.² You claim the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.117 of the Government Code and privileged pursuant to Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered the exceptions you claim and reviewed the submitted information.³

¹We note the district asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We note the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

³We 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.

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they do not pertain to any of the requested information. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note Exhibit F and the information we have marked in Exhibit H are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part the following:

(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:

(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). Exhibit F and the information we have marked in Exhibit H consist of completed reports and evaluations made by or for the district. Therefore, this information is subject to section 552.022(a)(1). You seek to withhold this information under sections 552.103, 552.107, and 552.111. Sections 552.103, 552.107, and 552.111 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. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other laws that make information expressly confidential for the purposes of section 552.022(a)(1). Therefore, the district may not withhold Exhibit F or the information we have marked in Exhibit H under section 552.103, section 552.107, or section 552.111 of the Government Code. As you raise no further exceptions for the information we have marked in Exhibit H, it must be released. However, you claim Exhibit F is privileged pursuant to Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We note the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether the district may withhold any of the information in Exhibit F under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

You contend Exhibit F is protected by the attorney-client privilege. Rule 503 of the Texas Rules of Evidence 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 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).

You state Exhibit F consists of an investigation report prepared by an attorney for the district in connection with allegations of employee misconduct. You represent Exhibit F was created for the purpose of facilitating the rendition of legal services to the district. You state this information was communicated only among the district's attorney and district representatives. You also state that this information has remained confidential. Based on these representations and our review of the information at issue, we agree you have established that Exhibit F is privileged under rule 503 of the Texas Rules of Evidence and

may be withheld on that basis.⁴ See *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice).

We will now address your argument under section 552.103 of the Government Code for the remaining information, which is not subject to section 552.022(a)(1). 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 governmental body 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 that the department 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 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). 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.* This office has found that a pending complaint filed with the EEOC indicates that litigation is reasonably anticipated. See, e.g., Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

⁴As our ruling on Exhibit F is dispositive, we need not address your remaining claim against disclosure of this information.

You state, and provide documentation showing, that the requestor filed a discrimination claim against the district with the EEOC. You explain that the EEOC has concluded its investigation of the complaint and issued a right-to-sue letter to the requestor on July 14, 2010. You further explain that the 90-day period in which the complainant has a right to sue ends on October 16, 2010 and, thus, had not expired when the district received this request for information. You also state the remaining information, which consists of personnel information pertaining to the requestor and two named employees and communications regarding the requestor's termination, is related to the requestor's claim of discrimination. Based on your representations and our review, we find the district reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, we conclude the district may generally withhold the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code.

However, we note the potential opposing party to the anticipated litigation has seen or had access to some of the information that is not subject to section 552.022(a)(1). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to any portion of the information not subject to section 552.022(a)(1), such information is not protected by section 552.103 and may not be withheld on that basis. We also note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, with the exception of the information the opposing party to the anticipated litigation has seen or accessed, the district may withhold the information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.⁵

In summary, the district may withhold Exhibit F under rule 503 of the Texas Rules of Evidence. With the exception of the information the opposing party to the anticipated litigation has seen or accessed, the district may withhold the information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The remaining information must be released.⁶

⁵As our ruling on this information is dispositive, we need not address your remaining claim against disclosure under section 552.117 of the Government Code.

⁶We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Thus, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.

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 Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 401305

Enc. Submitted documents

c: Requestor
(w/o enclosures)