ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 1, 2011

Mr. John T. Reynolds
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2011-01615

Dear Mr. Reynolds:

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# 407807.

The San Antonio Water System (the "system") received a request for twelve categories of information pertaining to a specified incident and a specified lift station from a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it relates to information created outside the time period specified by the request or was created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release that information in response to this request.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code, which provides in pertinent 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:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
> >
> > . . .
> >
> > (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The submitted information includes completed reports and investigations, vouchers and contracts related to the expenditure of public funds, and a court-filed document. These documents fall within the purview of subsections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(17), respectively. The system may only withhold the information subject to subsection 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The system may only withhold the information subject to subsections 552.022(a)(3) and 552.022(a)(17) if it is confidential under other law. You do not raise section 552.108 as an exception to disclosure. 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. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive Gov't Code § 552.111), 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 system may not withhold the information subject to section 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. However, 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 system may withhold any of the information subject to section 552.022 under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We will also consider your

arguments under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022.

In addition, we note a portion of the information subject to section 552.022(a)(3) is excepted from disclosure under section 552.136 of the Government Code, which is considered other law for purposes of section 552.022.[1] Section 552.136 states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136 (b). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136 (a). The system must withhold the information we have marked in the information that is subject to 552.022 under section 552.136 of the Government Code.[2]

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:
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> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> (B) between the lawyer and the lawyer's representative;
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> (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

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

[2]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

> (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 assert the information at issue consists of a confidential communication between system employees and its attorney that was made for the purpose of rendering professional legal advice to the system. You also state the confidentiality of the communication has been maintained. Based on these representations and our review of the information at issue, we agree this information consists of a privileged attorney-client communication. Accordingly, the system may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.[3]

We now address your claim under section 552.103 of the Government Code for the remaining responsive information. Section 552.103 provides in 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

[3]As our ruling for this information is dispositive, we need not address your remaining argument against its 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

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.* In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You state, and provide documentation showing, the system received a notice of claim letter prior to receiving the request for information from an attorney who states he represents two individuals involved in the specified incident. The letter states it was sent to the system in compliance with the TTCA, and alleges the system caused his clients exposure to *E. Coli* when it allowed a sewage leak from a compromised sewer line. Based on your representations and our review, we conclude litigation was reasonably anticipated on the date the system received the request for information. We further find the remaining information relates to the anticipated litigation. Accordingly, section 552.103 is generally applicable to the remaining responsive information not subject to section 552.022.

We note, however, the opposing party in the anticipated litigation has seen or had access to some of the information at issue. 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. Therefore, 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). Thus, the information the opposing party in the anticipated litigation has seen or had access to may not be withheld under section 552.103. Except for those documents, the remaining responsive information that is not subject to section 552.022 may be withheld at this time under section 552.103.[4] We note the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the system may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The system must withhold the information we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022 of the Government Code must be released. With the exception of the information the opposing party in the anticipated litigation has seen or had access to, the system may withhold the remaining responsive information under section 552.103 of the Government Code.

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,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/vb

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[4]As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

Ref: ID# 407807

Enc. Submitted documents

c: Requestor
(w/o enclosures)