ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Mr. Mark Anthony Sanchez
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115 East Travis, 19th Floor
San Antonio, Texas 78205

OR2011-05120

Dear Mr. Sanchez:

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# 414529 (G, W & S File No. 4984).

The Bexar Metropolitan Water District (the "district"), which you represent, received a request for nine categories of information relating to the district and the requestor's client. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence.[1] We have considered your submitted arguments and reviewed the submitted information.

Initially, we note portions of the submitted information consist of the minutes and agendas of public meetings of the district's Board of Directors (the "board"). The minutes and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), .043 (notice of meeting of governmental body

[1]Although the district raises 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). We further note that although you also cite to rule 192.5 of the Texas Rules of Civil Procedure, you make no arguments explaining the applicability of the work product privilege to the submitted information. Accordingly, we find that the district has waived its claim under this rule. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested).

must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), .053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district). As a general rule, the exceptions to disclosure found in the Act do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the minutes and agendas of the public meetings, which we have marked, must be released in accordance with section 551.022 of the Government Code.

We also note that the submitted information contains resolutions of the district's board. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolutions are analogous to ordinances. Accordingly, the district must release the submitted resolutions.

Next, we note some of the remaining information consists of completed reports and evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "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). The completed reports and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions that protect a governmental body's interest 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 section 552.103); Open Records Decision Nos. 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 and 552.107 are not other law that make information confidential for the purposes of section 552.022(a)(1). Therefore, the district may not withhold any of the information subject to 552.022 under section 552.103 or section 552.107 of the Government Code. The Texas Supreme Court, however, 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). Accordingly, we will consider your assertion of this privilege under rule 503 for the information subject to section 552.022. In addition, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will address your argument under this exception. We will also address your arguments for the remaining information not subject to section 552.022.

We next address your argument under section 552.108 of the Government Code for the information subject to section 552.022(a)(1), as well as for the remaining information. We understand you to claim section 552.108(a)(1), which excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the

detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision Nos. 474 at 4-5 (1987), 372 (1983). In this instance, you state the submitted information relates to a criminal investigation currently being conducted by federal authorities in Michigan. Where an agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a different law enforcement agency, the custodian of the records may withhold the information only if it provides this office with (1) a demonstration that the information relates to the pending case, and (2) a representation from the entity with the law enforcement interest stating that entity wishes to withhold the information. Thus, this office requires a representation from the other agency explaining how release of the submitted information will interfere with its pending case. This office has not received any such representation. Accordingly, we conclude the district failed to demonstrate the applicability of section 552.108 to the submitted information. Thus, the district may not withhold any of the submitted information under section 552.108(a)(1) of the Government Code.

Rule 503 of the Texas Rules of Evidence enacts 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:
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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;
> >
> > (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 claim the information subject to section 552.022(a)(1) consists of confidential attorney-client communications made in furtherance of the rendition of professional legal services to the district. Upon review, however, we find you have failed to establish any of the information subject to section 552.022(a)(1) of the Government Code constitutes privileged attorney-client communications. Therefore, none of this information may be withheld under rule 503 of the Texas Rules of Evidence. As no further exceptions to disclosure are raised for the information subject to section 552.022(a)(1), this information, which we have marked, must be released.

You assert that the remaining information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in 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.
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> . . .
>
> (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 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.); ORD 551 at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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).

In this instance, you provide documentation showing that, prior to the date of the receipt of the present request for information, the district received a demand letter from the requestor, an attorney representing the district's former General Manager, seeking reinstatement of his client's position or damages. Based on your representations and our review, we conclude the district reasonably anticipated litigation on the day it received the present request. Furthermore, we find the submitted information pertains to the anticipated litigation. Accordingly, with the exception of the marked information that is subject to section 552.022, the district may generally withhold the remaining information under section 552.103 of the Government Code.

We note, however, that the opposing party to 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 the anticipated 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). Accordingly, the portions of the information at issue that the opposing party to the anticipated litigation has seen or had access to, which we have marked for release, may not be withheld under section 552.103. However, the district may withhold the remaining information under section 552.103. We note the applicability of this exception ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next turn to your argument under section 552.107 of the Government Code for the information the opposing party has seen or had access. Section 552.107 protects information coming within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that

discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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." ORD 676. Upon review, we find you have failed to demonstrate how any of the remaining information at issue consists of or documents privileged attorney-client communications. Therefore, none of this information may be withheld under section 552.107(1) of the Government Code.

We note the remaining information includes the requestor's client's W-4 form. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (section 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). Section 6103(c) provides, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. *See* 26 U.S.C. § 6103(c). Therefore, pursuant to section 6103(c) of title 26 of

the United States Code, the district must release the requestor's client's W-4 form, which we have marked, to the requestor if the requestor is the client's designee and the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the W-4 form we have marked is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

We note the remaining information contains a personal e-mail address subject to section 552.137 of the Government Code.[2] Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[,]" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the marked e-mail address under section 552.137, unless the owner of the address affirmatively consents to its release.[3]

In summary, the district must release the minutes and agendas of the public meetings in accordance with section 551.022 of the Government Code, the submitted resolutions of its board, and the information subject to section 552.022(a)(1) of the Government Code. Except for the marked information that the opposing party in the pending litigation has seen or had access to, the district may withhold the remaining information under section 552.103 of the Government Code. If the requestor is the client's designee, then the district must release the marked W-4 form pursuant to section 6103 of title 26 of the United States Code. Otherwise, if the requestor is not the client's designee, then the marked W-4 form is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. The district must withhold the marked e-mail address under section 552.137, unless the owner of the address affirmatively consents to its release. The district must release the remaining information.[4]

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

[3]We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

[4]We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning

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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tf

Ref: ID# 414529

Enc. Submitted documents

c: Requestor
(w/o enclosures)

himself). Because such information is confidential with respect to the general public, if the district receives another request for this information from an individual other than this requestor or his client, the district must again seek a ruling from this office.