



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2011

Ms. Neera Chatterjee
Ms. Zeena Angadicheril
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-11561

Dear Ms. Chatterjee and Ms. Angadicheril:

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# 426557 (OGC# 137705).

The University of Texas Health Science Center at Houston (the "university") received a request for information pertaining to two named former employees. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. You state, and provide documentation showing, that you have notified The University of Texas Health Science Center at San Antonio ("San Antonio") about the instant request for information in accordance with section 552.304 of the Government Code. *See Gov't Code* § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have received comments from San Antonio. San Antonio claims the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.¹

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note most of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). In this instance, most of the submitted information pertains to a completed investigation. Section 552.022(a)(1) makes this information expressly public unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you seek to withhold the information subject to section 552.022(a)(1) under sections 552.103 and 552.107 of the Government Code and San Antonio raises section 552.103, those sections 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 § 52.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the university may not withhold the information subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of attorney-client privilege under rule 503 for the information subject to section 552.022. In addition, you claim some of this information is excepted from disclosure under section 552.101 of the Government Code. Because section 552.101 constitutes other law for purposes of section 552.022, we will address the applicability of this exception to the information at issue. We will also consider the arguments for the information not subject to section 552.022.

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. Section 552.101 encompasses confidentiality provisions such as section 161.032 of the Health and Safety Code, which provides in relevant part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing

body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital, . . . university medical center or health science center, [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You state the marked information in Tab 10 is maintained by the university's Office of Institutional Compliance (the "OIC") in connection with a compliance investigation. You inform us this investigation was performed in accordance with the university's compliance program. You indicate the documents at issue are not made or maintained in the regular course of business. *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Based on your representations and our review, we conclude the marked information consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must withhold the marked information in Tab 10 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.²

Rule 503 of the Texas Rules of Evidence encompasses 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:

(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;

²As our ruling is dispositive, we need not address your remaining argument for this information.

(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 that 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 that 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 claim the remaining documents you have marked in Tab 12 subject to section 552.022 are privileged attorney-client communications. You state the information documents communications between and amongst university staff and a university attorney that were made for the purpose of providing legal advice to the university. You have identified the parties to the communications. You state these communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the university may withhold the information we have marked in Tab 12 under rule 503.

We now consider your arguments for the information in Tab 11 that is not subject to section 552.022. Section 552.103 of the Government Code 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.

...

(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 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 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 from disclosure under section 552.103(a).

The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See* Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You state that prior to the university's receipt of the request for information, an employee filed a complaint against San Antonio with the EEOC alleging sexual, racial, and age discrimination. We note the university is not a party to these proceedings and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. San Antonio has submitted such a representation to this office. Based on these representations and our review, we find you have demonstrated litigation was reasonably anticipated when the university received the request for information. We also find the university and San Antonio have established the information in Tab 11 is related to the anticipated litigation for purposes of section 552.103(a). Thus, the university may withhold the information in Tab 11 under section 552.103 of the Government Code.³

We note, however, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

Records Decision No. 349 at 2 (1982). We also note 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).

In summary, the university must withhold the marked information in Tab 10 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The university may withhold the information we have marked in Tab 12 under rule 503. The university may withhold the information in Tab 11 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
Assistant Attorney General
Open Records Division

PL/tf

Ref: ID# 426557

Enc. Submitted documents

c: Requestor
(w/o enclosures)