



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2011

Mr. Carlyle H. Chapman, Jr.
Locke, Lord, Bissell & Liddell, L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

OR2011-14560

Dear Mr. Chapman:

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# 432272.

The North Texas Tollway Authority (the "authority"), which you represent, received two requests from the same requestor for twenty-seven categories of information relating to specified retaining walls. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note some of the submitted 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:

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

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted information contains the following types of completed reports made by or for the authority: Certified Material Test Reports, Compaction Test Reports, General Test Reports, and Drilled Shaft Inspection Reports (collectively, the "completed reports") that are subject to section 552.022(1)(1). The submitted information also includes Change Orders and the Project Agreement SII 121 Toll Project (the "agreement") between the authority and the Texas Department of Transportation that are subject to section 552.022(a)(3). The authority may withhold the information subject to section 552.022(a)(1) only if it is made confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. The authority may withhold information subject to section 552.022(a)(3) only if it is made confidential under "other law." Sections 552.103 and 552.107 of the Government Code are discretionary exceptions 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. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Consequently, the completed reports, Change Orders, and agreement may not be withheld under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held that 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). We will therefore consider your attorney-client privilege argument under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. We will also consider your arguments under sections 552.103 and 552.107 for the remaining information.

Texas Rule of Evidence 503 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:

- (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 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).

Upon review, we find you have failed to establish how the documents subject to section 552.022 constitute attorney-client communications made confidential by rule 503. Therefore, because you failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the information subject to section 552.022, we determine this information is not privileged and it may not be withheld under rule 503. *See* ORD 676. As you raise no other exceptions to disclosure of the information at issue, the completed reports, Change Orders, and agreement must be released.

You assert the remaining information is excepted from disclosure under section 552.103 of the Government Code, which 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 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 of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). 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." Open Records Decision No. 518 at 5 (1989).

You explain the authority entered into contracts involving, among other things, the construction of retaining walls on the President George Bush Turnpike. You state a portion of one of the retaining walls failed and the authority subsequently learned that other retaining walls along the President George Bush Turnpike, including the retaining walls at issue in the present request, may be defective due to design or construction. You inform us that, prior to its receipt of the instant requests for information, the authority issued a notice of claim to the requestor's client, which provided general engineering consulting services for the construction of the retaining walls at issue, as well as other parties involved in the construction of the retaining walls. You explain the notice of claim notified the requestor's client of the defects and deficiencies in the retaining walls and sought to recover costs the authority incurred because of the failed wall and the resulting investigation and remediation measures undertaken by the authority for the other retaining walls. You have provided a copy of the notice of claim. You state the authority intends to pursue its claim against the requestor's client "by all means necessary, including litigation." Based on your representations and our review, we conclude the authority reasonably anticipated litigation when it received the request for information. You state the remaining information is related to the anticipated litigation because it pertains to the subject matter of the anticipated litigation. Accordingly, we find the authority may withhold the remaining information under section 552.103(a) of the Government Code.²

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

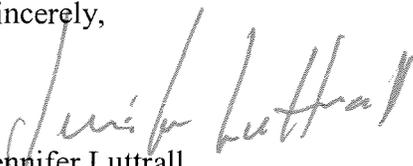
Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the authority must release the submitted completed reports, Change Orders, and agreement that are subject to subsections 552.022(a)(1) and 552.022(a)(3) of the Government Code. The authority may withhold the remaining 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 432272

Enc. Submitted documents

c: Requestor
(w/o enclosures)