



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2011

Mr. Carlyle H. Chapman, Jr.
Locke Lord Bissell & Liddell LLP
2200 Ross Avenue, Suite 220
Dallas, Texas 75201-6776

OR2011-14574

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# 433072.

The North Texas Tollway Authority (the "authority"), which you represent, received a request for eleven categories of information relating to the failure of several retaining walls in connection with a specified construction project. You state the authority does not have some of the requested information.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, we note the following information is subject to section 552.022 of the Government Code: the pages you have numbered 0045459-0045493, 0045508-0045762, 0045777-0045786, 0045963-0045973, 0045975-0045986, 0045988-0045997,

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We 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.

0045999-0046009, 0046012-0046046, 0046084-0046094, 0046099-0046104, 0046106-0046117, 0046216-0046226, 0046228-0046239, 0046241-0046250, 0046336-0046347, 0046349-0046358, 0046361-0046371, 0046373-0046378, 0046380-0046391, 0046393-0046402, 0046404-0046414, and 0046416-0046425. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. In addition, under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is confidential under other law. Although you assert this information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions under the Act and do not constitute “other law” for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (section 552.103 may be waived); Open Records Decision Nos. 677 at 10 (2002) (section 552.111 is not other law for purposes of section 552.022), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, the authority may not withhold this information under section 552.103, 552.107, or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 for the information subject to section 552.022.

Rule 503(b)(1) provides the following:

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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

Having considered your representations and reviewed the information at issue, we find you have not established the information subject to section 552.022 constitutes privileged attorney-client communications. Therefore, the authority may not withhold this information under rule 503, but instead must release it to the requestor.

We note some of the information subject to section 552.022 may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

You assert the submitted information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides, in part, the following:

(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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

You claim the remaining information is excepted under section 552.103 because it relates to reasonably anticipated litigation. You explain the authority entered into contracts involving, among other things, the construction of retaining walls on the President George Bush Turnpike. You state portions of the retaining walls failed and the authority undertook emergency measures to stabilize and secure the retaining walls and surrounding areas. You inform us that, prior to its receipt of the instant request for information, the authority issued

a notice of claim to the requestor's client, which provided geotechnical engineering services for the construction of the failed retaining walls. You explain the notice of claim notified the requestor's client of the retaining wall failures and sought to recover costs incurred because of the failed walls and the resulting investigation and remediation measures undertaken by the authority. 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 and available, 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 cause of the retaining wall failures. Therefore, we agree the authority may withhold the remaining information under section 552.103.³

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party 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).

To conclude, the authority must release the pages you have numbered 0045459-0045493, 0045508-0045762, 0045777-0045786, 0045963-0045973, 0045975-0045986, 0045988-0045997, 0045999-0046009, 0046012-0046046, 0046084-0046094, 0046099-0046104, 0046106-0046117, 0046216-0046226, 0046228-0046239, 0046241-0046250, 0046336-0046347, 0046349-0046358, 0046361-0046371, 0046373-0046378, 0046380-0046391, 0046393-0046402, 0046404-0046414, and 0046416-0046425 to the requestor. However, the authority may only release any copyrighted information in accordance with copyright law. 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

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

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 433072

Enc. Submitted documents

c: Requestor
(w/o enclosures)