



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2011

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

OR2011-16608

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# 435783.

The North Texas Tollway Authority (the "authority"), which you represent, received a request for (1) supporting documentation for the Kleinfelder report; (2) documents related to wall failures referenced in two specified requests from the requestor; and (3) the project file pertaining to the design and construction of retaining walls 1R, 1L 2R, 2L, 3R, 3L, 4R, 4L, 50, 101, 102, 201, and 202. You claim that 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

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they pertain to retaining walls not made a part of this request. This ruling does not address the public availability of any information that is not responsive to the request, and the authority need not release that information in response to this request.

You inform us some of the requested information is the subject of pending litigation styled *North Texas Tollway Authority v. Abbott*, Cause No. D-1-GN-10-002245, 353rd District Court, Travis County, Texas. You state the authority will abide by the court's decision with respect to the information at issue in the litigation. Accordingly, we will allow the trial court to determine whether the information at issue in the litigation must be released to the public.

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.

You state that some of the submitted information was the subject of previous rulings by this office. In Open Records Letter Nos. 2011-14574 (2011), 2011-14560 (2011), and 2011-01960 (2011), this office ruled that some of the information at issue may be withheld under section 552.103 of the Government Code and some of the information must be released pursuant to section 552.022(a) of the Government Code. As we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the authority must continue to rely on the prior rulings as previous determinations and withhold or release the submitted information we previously ruled on in accordance with Open Records Letter Nos. 2011-14574, 2011-14560, and 2011-01960. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the previous decisions, we will address your arguments for the remaining information.

We note the remaining information contains resolutions and minute orders. 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). A resolution is analogous to an ordinance. Accordingly, the resolutions must be released. Furthermore, the minute orders appear to have been adopted at a public meeting of the former Texas Transportation Commission and thus are official records of the public proceedings of a governmental body. As such, the minute orders must also be released. *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”).

We also note portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

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 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; [and]
- (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: Auditor's Reports, Inspector's Daily Reports, Inspector's Daily Diary Reports, and Manpower and Equipment Usage reports. The submitted information also contains contracts related to the receipt or expenditure of funds by the authority. Although you assert this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *Id.* §§ 3-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *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 Nos. 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. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the authority may not withhold the information subject to section 552.022 under section 552.103 or 552.107.

However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *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 information subject to section 552.022 must be released.

We next address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. 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 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 a retaining wall on the President George Bush Turnpike. You state a portion of the retaining wall failed and the authority undertook emergency measures to stabilize and secure the retaining wall and surrounding areas. You also state the authority engaged the services of a consultant, Kleinfelder, Inc., to perform a forensic investigation of the retaining wall to determine the cause of the failure. You inform us that, prior to its receipt of the instant request for information, the authority issued notice of claim letters to several parties, including the requestor’s company, related to the construction of the failed retaining wall and other retaining walls. You have provided copies of the relevant notices of claim. You state the authority intends to pursue its claim against the parties, including the requestor’s company, “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 information at issue is related to the anticipated litigation because it pertains to the causes of the retaining wall’s failure and the possible failure of other retaining walls. Accordingly, the authority may withhold the remaining submitted 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. *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

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

anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we will allow the trial court to determine whether the information at issue in the litigation must be released to the public. The authority must continue to rely on Open Records Letter Nos. 2011-14574, 2011-14560, and 2011-01960 as previous determinations and withhold or release the submitted information we previously ruled on in accordance with the prior rulings. The submitted resolutions and minute orders must be released. The authority must release the completed reports and contracts 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 435783

Enc. Submitted documents

c: Requestor
(w/o enclosures)