



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2011

Mr. Philip S. Haag
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue, Suite 2100
Austin, Texas 78701

OR2011-18170

Dear Mr. Haag:

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# 438418.

The Dripping Springs Water Supply Corporation (the "corporation"), which you represent, received requests from five different requestors for several categories of information pertaining to the operation and management of the corporation, including, among others: (1) a specified investigation regarding a named former employee; (2) documents sent or received by named individuals during specified time periods; (3) the most recent audit; (4) minutes and recordings of specified board meetings; (5) certain proxy forms; (6) the names and address of the corporation's members; and (7) bank and credit statements and monthly reoccurring bills. You state the corporation does not have information responsive to part of the request for documents sent or received by certain named individuals.¹ You also state the corporation received clarification from some of the requestors concerning their requests for information.² You state the corporation will release some of the responsive information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²You state, and provide documentation showing, the corporation asked for and received clarification of some of the requests. *See Gov't Code* § 552.222(b)(providing that if request for information is unclear, governmental body may ask requestor to clarify the request).

You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.136 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information contains agendas, minutes, and recordings of public meetings of the corporation. The agendas, minutes, and recordings of a governmental body's public meetings are specifically made public under provisions of 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 on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). You seek to withhold some of this information under sections 552.103 and 552.107. As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the submitted agendas, minutes, and recordings of the public meetings must be released pursuant to section 551.022 of the Government Code.

Next, section 552.022 of the Government Code 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 disclosure unless made confidential under this chapter or 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]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). In this instance, you inform us some of the submitted information, which you have marked, is from a completed investigation and is subject to section 552.022(a)(1). We also note the submitted information includes attorney fee bills which are subject to section 552.022(a)(16). Although you assert the information subject to section 552.022 is excepted from disclosure under section 552.107, this section is discretionary and does not make information confidential under the Act. *Id.*

§§ 3-21, 23-26, 28-37(providing for “confidentiality” of information under specified exceptions); Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the corporation may not withhold the information subject to section 552.022 under section 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). Therefore, we will consider your arguments under Texas Rule of Evidence 503.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7.

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 state the corporation's outside counsel used the services of a named individual to conduct an investigation into the conduct of an employee. You explain the investigation was authorized by the corporation's board of directors and was used by the outside counsel to provide legal services to the corporation. Based on your representations and our review of the information at issue, we conclude that the information from the completed investigation, which you have marked, is privileged under rule 503 of the Texas Rules of Evidence. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the corporation may withhold this information under rule 503.

As for the attorney fee bills, we note you have failed to identify the parties to the communications in this information. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Gov't Code § 552.301(e)(1)(A); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Nevertheless, upon review, we are able to discern from the face of the documents that certain individuals are privileged parties. Accordingly, we conclude the corporation may withhold the information you have marked in the fee bills, except as we have marked for release, under Texas Rule of Evidence 503. However, you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information you seek to withhold. Consequently, the corporation may not withhold any of the remaining information at issue in the fee bills under rule 503.

We now turn to your arguments for the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above.

You state the information you have marked consists of communications between outside counsel and the corporation's board members and employees that were made for the purpose of facilitating the rendition of professional legal services to the corporation. You state these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we conclude the corporation may generally withhold the information at issue under section 552.107(1) of the Government Code.³ However, we note some of the submitted e-mail strings include communications with non-privileged parties. If the communications with these non-privileged parties, which we have marked, exist separate and apart from the e-mail strings in which they appear, then they may not be withheld under section 552.107.

You claim some of 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). A 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 was 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). A 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

³As our ruling is dispositive, we need not address your argument under section 552.103 for this information.

conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* at 4. 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 state prior to the corporation’s receipt of the first request, the corporation had terminated a named individual’s employment contract for cause. You also state that prior to the termination of this contract, the corporation received a litigation hold demand from an attorney for the individual. Furthermore, you state the individual’s attorneys have publicly threatened litigation against the corporation. Thus, we find that the corporation reasonably anticipated litigation at the time it received the first request for information. You explain the information you have marked is directly related to the individual’s performance under his employment contract. Based upon your representations and our review, we conclude section 552.103 is generally applicable to the information you have marked.

We note that 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. Thus, when the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the former employee has already seen or had access to some of the information at issue. However, this employee only saw or had access to most of this information in the usual scope of his employment. Such information is not considered to have been obtained by the opposing party to litigation. However, we have marked information that the former employee had access to outside the scope of his employment. Therefore, with the exception of the information we have marked for release, the corporation may withhold the information you have marked under section 552.103. We note that the applicability of this exception ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note some of the remaining information may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

telephone numbers, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). We note an individual's personal post office box number is not a "home address" and, therefore, may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 6 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). We also note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, to the extent the individuals at issue timely elected to keep their personal information confidential, the corporation must withhold the information we have marked under section 552.117(a)(1), including cellular telephone numbers not paid for by the corporation.

You claim some of the remaining information, consisting of certain addresses and telephone numbers, is excepted under section 552.101 of the Government Code. Section 552.101 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. Section 182.052 of the Utilities Code provides in relevant part the following:

(a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.

(b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). Section 182.054 of the Utilities Code provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054. “Personal information” under section 182.052(a) of the Utilities Code means an individual’s address, telephone number, or social security number. *Id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). We note that the names of customers are not included in the definition of personal information, and therefore are not confidential under section 182.052 of the Utilities Code. A customer’s request for confidentiality must precede the utility’s receipt of the request for information. ORD 625 at 6. Lastly, section 182.052 protects the personal information of natural persons only and not of artificial entities such as corporations, partnerships, or other business associations. *Id.* at 3-4. You inform us that none of the customers at issue have requested that their personal information be kept confidential. Accordingly, we find the corporation may not withhold any of the information at issue under section 552.101 in conjunction with section 182.052.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s or driver’s license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130(a)(1), (2)). The corporation generally must withhold the information we have marked under section 552.130 of the Government Code. We note, however, the information at issue includes the driver’s license number of an individual represented by one of the requestors. This requestor has a right of access to his client’s driver’s license number, and that information may not be withheld from him under section 552.130. *See* Gov’t Code § 552.023(b) (“person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”).

Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Accordingly, the corporation must withhold the insurance policy numbers, credit card numbers, bank account and routing numbers, and utilities account numbers we have marked under section 552.136. We also note the submitted proxies include three digit account numbers. If these account numbers are used by the members to obtain

water services from the corporation, then the corporation must also withhold these numbers under section 552.136.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. 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). *Id.* § 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. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). The corporation must generally withhold the e-mail addresses we have marked under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release.⁵ *See id.* § 552.137(b). We note, however, one of the e-mail addresses belongs to one of the requestors. According, this requestor has a right of access to his own e-mail address and it may not be withheld from him under section 552.137. *See id.* § 552.023.

Finally, some of the remaining information appears to 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.

In summary, the corporation must release the submitted agendas, minutes, and recordings of the public meetings pursuant to section 551.022 of the Government Code. The corporation may withhold the information from the completed investigation, which you have marked, under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked for release, the corporation may withhold the information you have marked in the submitted fee bills on this same basis. The corporation may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the communications with the non-privileged parties, which we have marked, exist separate and apart from the e-mail strings in which they appear, then they may not be withheld under

⁵ We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas license plate number under section 552.130(a)(2) of the Government Code and a personal e-mail address under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 552.107. The corporation may withhold the information you have marked under section 552.103 of the Government Code, except as we have marked for release. To the extent the individuals at issue timely elected to keep their personal information confidential, the corporation must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including cellular telephone numbers not paid for by the corporation. The corporation must withhold the information we have marked under (1) section 552.130 of the Government Code, except the corporation must release the driver's license of one individual to his attorney; (2) section 552.136 of the Government Code, including the account numbers in the proxies if these numbers are used to obtain water services; and (3) section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release or the e-mail address belongs to the requestor. The corporation must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/ag

Ref: ID# 438418

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)