



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2011

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Mr. Cris Feldman
Attorney for The Mental Health Mental Retardation Agency of Harris County
Rusty Hardin & Associates, P.C.
1401 McKinney, Suite 2250
Houston, Texas 77010-4035

OR2011-18845

Dear Mr. Feldman:

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# 440207 (MHMRA503).

The Mental Health Mental Retardation Agency of Harris County (the "agency"), which you represent, received a request for ten categories of information relating to a named individual, the Mental Health Section of the Harris County District Attorney's Office, communications between specified entities, and the use of certain information and witnesses in court. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted representative sample of information.² We have also

¹You also assert some of the submitted information is privileged under Texas Rule of Evidence 510 in conjunction with section 552.107 of the Government Code and under Texas Rule of Evidence 503. However, section 552.107 does not encompass rule 510. Further, although 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, the information at issue is not subject to section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, rules 503 and 510 do not apply in this instance.

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.

received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We next note a portion of Exhibit 14, which we have marked, was created after the date the agency received the request. The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Thus, the marked information is not responsive to the request. This decision does not address the public availability of non-responsive information, and the agency need not release it in response to this request.

You argue all of the requested information is protected by section 552.103 of the Government Code. Section 552.103 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.

Id. § 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 applies 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 requested information is related to that litigation. *See 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 refused n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere

conjecture. *Id.* 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.³ 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. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert the agency reasonably anticipated litigation on the date of the request. You state the agency was informed by a third party that the requestor intended to file suit against the agency. However, you have not demonstrated that the requestor had taken any concrete steps towards litigation on the date the request was received. *See* Open Records Decision No. 331 (1982). Although the request was made by an attorney for the requestor, as noted above, the fact that an attorney representing a potential opposing party requested information, without more, does not establish that litigation was reasonably anticipated. Thus, we find you have failed to demonstrate the agency reasonably anticipated litigation when the request for information was received. *See* Gov't Code §§ 552.103(c) (governmental body must demonstrate that litigation was pending or reasonably anticipated on or before the date it received request for information), .301(e)(1) (requiring governmental body to explain applicability of raised exception). Accordingly, the agency may not withhold the requested information in its entirety under section 552.103.

You also assert Exhibits 8 through 11 are separately protected by section 552.103 because they relate to ongoing criminal prosecutions. We note the purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 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). Although you represent Exhibits 8 through 11 pertain to pending criminal prosecutions, we note the agency is not a party to these prosecutions, and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). 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. Because you have not

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

provided such a representation, we conclude the agency may not withhold Exhibits 8 through 11 under section 552.103 of the Government Code.

You also assert Exhibits 8 through 11 are protected by section 552.101 of the Government Code in conjunction with article 46C.265(b) of the Code of Criminal Procedure. Section 525.101 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 information made confidential by other statutes. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision’s structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Article 46C.265(b) provides that when a person is acquitted by reason of insanity with a finding of dangerous conduct, the person responsible for administering a regimen of outpatient or community-based treatment must notify the court when a person under such treatment does not comply with the regimen and is likely to cause harm to another person. *See* Crim. Proc. Code art. 46C.265(b). However, article 46C.265 does not explicitly provide that any information is confidential. Therefore, the agency may not withhold any of the requested information under section 552.101 of the Government Code on that basis.

You also assert Exhibits 8 through 11 are protected by section 552.101 of the Government Code in conjunction with 611.002 of the Health and Safety Code. Section 611.002 provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990) . These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004-.0045. Upon review, we find Exhibit 9 constitutes mental health records that are confidential under section 611.002 of the Health and Safety Code. Therefore, Exhibit 9 may be released only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. However, we find the remaining information you seek to withhold does not constitute mental health records for purposes of section 611.002 and may not be withheld on that basis.

You claim section 552.107 of the Government Code for Exhibits 12 through 16. Section 552.107(1) protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert Exhibits 12 through 16 consist of privileged attorney-client communications. You have identified most of the parties to the communications as attorneys for and employees of the agency. We understand the communications at issue were made in furtherance of the rendition of legal services and were intended to be, and have remained, confidential. Upon review, we find you have established the elements of the attorney-client privilege for Exhibits 12 through 16. Therefore, the agency may generally withhold Exhibits 12 through 16 under section 552.107. However, we note some of the individual e-mails contained in the otherwise privileged e-mail strings consist of communications with non-privileged parties. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1).

You raise section 552.111 of the Government Code for Exhibits 17 and 18. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of

Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

Upon review, we find you have failed to demonstrate how Exhibits 17 and 18 constitute material prepared, impressions developed, or communications made in anticipation of litigation or for trial by or for the agency. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, the agency may not withhold any of the requested information under section 552.111 of the Government Code on the basis of the work-product privilege.

We note Exhibits 7 and 10 contain information subject to section 552.117 of the Government Code.⁴ In the event the non-privileged e-mails we have marked in Exhibit 14 exist separate and apart from the otherwise privileged e-mail strings, we also address section 552.117 for

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

the information we have marked in Exhibit 14. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1)). Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The agency may withhold information under section 552.117 only on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked cellular telephone numbers in Exhibits 7, 10 and 14 that are subject to section 552.117(a)(1). If the employees whose information we marked timely elected to keep their personal information confidential, and if the cellular service is not paid for by a governmental body, the agency must withhold the cellular telephone numbers we have marked. The agency may not withhold this information under section 552.117 if the employees did not make timely elections to keep the information confidential or if the cellular service is paid for by a governmental body.

We note Exhibits 5, 10, and 11 contain e-mail addresses subject to section 552.137 of the Government Code. In the event the e-mails we have marked in Exhibit 14 exist separate and apart from the privileged e-mail strings, we also address section 552.137 for the e-mail addresses we have marked in Exhibit 14. 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Accordingly, the agency must withhold the e-mail addresses we have marked under section 552.137, unless their owners have affirmatively consented to disclosure.⁵

In summary, the agency may release Exhibit 9 only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Except to the extent the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings, the agency may withhold the responsive information in Exhibits 12 through 16 under

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 552.107 of the Government Code. If the employees at issue timely elected to keep their personal information confidential and if the cellular service is not paid for by a governmental body, the agency must withhold the information we marked under section 552.117 of the Government Code in Exhibits 7 and 10, and in Exhibit 14 if the e-mails we have marked exist separate and apart from the other privileged e-mail strings. The agency must withhold the e-mail addresses we marked under section 552.137 of the Government Code in Exhibits 5, 10, and 11, and in Exhibit 14 if the e-mails we have marked exist separate and apart from the other privileged e-mail strings, unless their owners have affirmatively consented to disclosure. The remaining requested information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 440207

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Filed in The District Court of Travis County, Texas

APR 02 2015 myr

At 2 P M. Velva L. Price, District Clerk

CAUSE NO. D-1-GN-12-000129

MENTAL HEALTH AND MENTAL	§	IN THE DISTRICT COURT
RETARDATION AUTHORITY OF	§	
HARRIS COUNTY ("MHMRA") and	§	
DR. STEVEN SCHNEE, PH.D., IN	§	
HIS OFFICIAL CAPACITY AS	§	
CUSTODIAN OF PUBLIC RECORDS	§	
FOR MHMRA,	§	
<i>Plaintiffs,</i>	§	126 th JUDICIAL DISTRICT
	§	
v.	§	
	§	
GREG ABBOTT, ATTORNEY	§	
GENERAL OF TEXAS, ¹	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

AGREED ORDER OF DISMISSAL

This cause is an action brought under the Public Information Act (PIA), Texas Government Code Chapter 552. Plaintiffs Mental Health and Mental Retardation Authority of Harris County and Dr. Steven Schnee, Ph.D., in his official capacity as Custodian of Public Records (collectively, MHMRA) and Defendant Ken Paxton, Attorney General of Texas, agree that this matter should be dismissed pursuant to Tex. Gov't Code § 552.327. A court may dismiss a PIA suit pursuant to section 552.327 when all the parties agree to the dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request or has abandoned the request. Tex. Gov't Code § 552.327. The requestor, Mr. Millard A. Johnson, on behalf of his client Susan Bishop, has abandoned the request for information that gave rise to this lawsuit. Accordingly, the parties request that the Court enter this Agreed Order of Dismissal. The Court is of the opinion that entry of an agreed dismissal order is appropriate.

¹ Greg Abbott was named defendant in his official capacity as Texas Attorney General. Ken Paxton became Texas Attorney General on January 5, 2015, and is now the appropriate defendant in this cause.

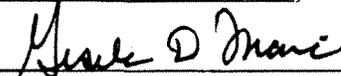


IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that Plaintiffs' cause of action against Defendant is dismissed in all respects;

All relief not expressly granted is denied; and

This Order disposes of all claims between the parties as final.

Signed this 2nd day of April, 2015.



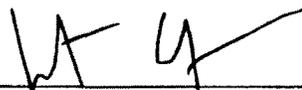
JUDGE PRESIDING

AGREED:



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