



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2012

Ms. Jessica L. Saldivar
Assistant General Counsel
Houston Community College
P.O. Box 667517
Houston, Texas 77266-7517

OR2012-02193

Dear Ms. Saldivar:

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# 445225.

The Houston Community College (the "college") received a request for the "full investigation of EOC# 10-52 and EOC# 406-2011-02479." You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

We note some of the submitted information is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(1). In this instance, the submitted Investigative Memorandum and Fact-Finding Summary relate to a completed investigation made by or for the college. Thus, this information is subject to disclosure under section 552.022(a)(1). Although you assert the Investigative Memorandum is excepted from disclosure under sections 552.103 and 552.107, these sections are discretionary and do not make information confidential under the Act. *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 college may not withhold the Investigative Memorandum under section 552.103 or 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 for the Investigative Memorandum. We will also consider your claims under sections 552.103 and 552.107 for the information not subject section 552.022. As you raise no exceptions to disclosure for the Fact-Finding Summary, it must be released.

We first address your argument under section 552.103 of the Government Code for the Respondent’s Position Statement, which is 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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated 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 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 from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture.” Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed

a complaint with the Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision No. 336 (1982).

You state, and provide documentation reflecting, the requestor filed a complaint against the college with the EEOC before the date the college received the present request for information. Based on your representation and our review, we agree the college reasonably anticipated litigation on the date the college received the present request. We also agree the Respondent’s Position Statement is related to the anticipated litigation. As such, we conclude the college may withhold the Respondent’s Position Statement under section 552.103 of the Government Code.¹

We note that once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, we address your argument for the information that is subject to section 552.022. Texas Rule of Evidence 503 enacts the attorney-client privilege, providing in relevant part:

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.

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the submitted Investigative Memorandum consists of a communication that has remained confidential. However, you do not assert that this information was made for the purpose of facilitating the rendition of legal services to the college. Further, you do not explain how the information at issue constitutes or documents a privileged attorney-client communication. Thus, we find you have failed to establish that the attorney-client privilege is applicable to the submitted Investigative Memorandum. Thus, the college may not withhold the submitted Investigative Memorandum under rule 503 of the Texas Rules of Evidence.

We note that some of the remaining information is subject to section 552.117(a)(2) of the Government Code.² Section 552.117(a)(2) excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the college must withhold the information we have marked under section 552.117(a)(2).

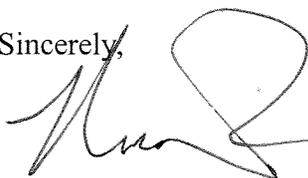
In summary, the college may withhold the Respondent’s Position Statement under section 552.103 of the Government Code. The college must withhold the information we have marked in the Investigative Memorandum under section 552.117(a)(2) of the Government Code. The college must release the Fact-Finding Summary and the remaining information in the Investigative Memorandum.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink, appearing to read 'Nneka Kanu', with a large, stylized flourish at the end.

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 445225

Enc. Submitted documents

cc: Requestor
(w/o enclosures)