



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2013

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-03132

Dear Ms. Chatterjee:

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# 479607 (UT OGC# 147644).

The University of Texas System (the "system") received a request for information pertaining to the application of a specified law "to incremental salary deductions in the case of salaried exempt employees absent for less than a full day's work due to sickness or disability." You claim the submitted 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 representative sample of information.¹

Initially, we note the submitted information includes a completed investigation, which we have marked, that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is made confidential under the Act or "other law" or is excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). The completed investigation must be released pursuant to section 552.022(a)(1) unless it is

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 that those records contain substantially different types of information than that submitted to this office.

excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Although you assert the completed investigation is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these exceptions 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); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the completed investigation we have marked may not be withheld under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the applicability of rule 503 of the Texas Rules of Evidence to the information subject to section 552.022. We also will address your arguments against disclosure of the information not subject to section 552.022(a)(1).

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 completed investigation consists of confidential communications between system attorneys and officials and employees of the University of Texas at Brownsville (the “university”). You state the completed investigation was made for the purpose of providing legal counsel to the system and university employees and officials. You further state the completed investigation has been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the completed investigation subject to section 552.022, which we have marked. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding 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 system may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.

We will address your arguments for the information not subject to section 552.022. Section 552.103 of the Government Code 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 the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (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, orig. proceeding); *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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has stated a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, the requestor filed a complaint against the system with the EEOC prior to the date the system received the instant request. You explain the remaining information may be used by the requestor to bolster his claims, but also expand the scope of his allegations within his EEOC complaint. Based on your representations and our review, we agree the system reasonably anticipated litigation on the date the system received the present request for information. We also agree the information not subject to section 552.022 is related to the anticipated litigation. Thus, we conclude section 552.103 is generally applicable to the information not subject to section 552.022.

We note, however, once 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. *See* 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 it must be disclosed. We note the opposing party has seen or had access to a portion of the information not subject to section 552.022. Therefore, this information, which we have marked, is not protected by section 552.103 and may not be withheld on that basis. Thus, with the exception of the information seen by the opposing party to the anticipated litigation, which we have marked, the system may withhold the remaining information not subject to section 552.022 under section 552.103. We note 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).

Next, we will address your remaining argument for the information that was seen by the opposing party. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed above for rule 503. 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. 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).

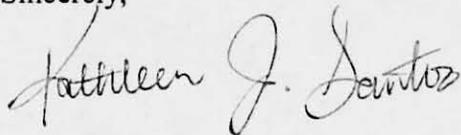
You contend the information seen by the opposing party to the anticipated litigation consists of confidential attorney-client privileged communications. You state the information at issue consists of confidential communications between system attorneys and officials and employees of the university. You state the communications were made for the purpose of providing legal counsel to the system and university employees and officials. You further state the communications at issue have been kept confidential. Thus, we find this information is subject to section 552.107. However, we note the information at issue consists of non-privileged e-mails that are included in otherwise privileged e-mail strings. Furthermore, if the e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the system separate and apart from the otherwise privileged e-mail strings in which they appear, then the system may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the system may withhold the marked e-mails under section 552.107(1) of the Government Code.

In summary, the system must withhold the completed investigation we have marked under Texas Rule of Evidence 503. With the exception of the information seen by the opposing party to the anticipated litigation, which we have marked, the system may withhold the remaining information under section 552.103. To the extent the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the system may withhold the marked e-mails under section 552.107(1) of the Government Code. However, if the marked e-mails are maintained by the system separate and apart from the otherwise privileged e-mail strings in which they appear, then the system may not withhold the marked e-mails under section 552.107(1) 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,

A handwritten signature in cursive script that reads "Kathleen J. Santos".

Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/dls

Ref: ID# 479607

Enc. Submitted documents

c: Requestor
(w/o enclosures)