



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2014

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County
1019 Congress Avenue, 15th Floor
Houston, Texas 77002

OR2014-05296

Dear Ms. Thornton:

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# 518294 (CAO File No. 14PIA0008).

The Harris County Attorney's Office (the "county attorney's office") received a request for all election residency complaints received and/or investigated by the county attorney's office during a specified time period and "a list of cases filed relating to those complaints/investigations." You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 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 contains court-filed documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). The court-filed

¹We assume that 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.

documents are subject to section 552.022(a)(17). Although you seek to withhold this information under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure 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 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive section 552.111); see also 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the county attorney's office may not withhold the court-filed documents under section 552.103, section 552.107, or section 552.111.

However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. Additionally, we will address your arguments for the information not subject to section 552.022 of the Government Code.

We first address your claim that the submitted information not subject to section 552.022 is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides, in relevant part, as follows:

(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 section 552.103(a) 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 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). *See* ORD 551 at 4.

You state litigation styled *State of Texas v. Wilson*, Cause No. 2013-75695, is pending in the District Court of Harris County, 151st Judicial District. We understand the county attorney's office represents the plaintiff in the litigation. You indicate the litigation was pending prior to the date the county attorney's office received the instant request. You state the information at issue is related to the pending litigation. Based on your representations and our review of the information, we find litigation was pending when the county attorney's office received the request for information and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the county attorney's office may withhold the submitted information not subject to section 552.022(a)(17) of the Government Code under section 552.103 of the Government Code.²

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withhold such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 91982); Open Records Decision No. 350 (1982).

Next, we address your assertion of the attorney-client privilege for the information subject to section 552.022(a)(17). Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) 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

²As we make this determination, we need not address your remaining arguments for this information.

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). The elements of the privilege under rule 503 are the same as those discussed for section 552.107 of the Government Code. Upon a demonstration of the 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 information at issue consists of communications between the county attorney’s office, its attorneys, and its clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the clients. However, you do not identify the parties to the communications. Further, you fail to explain these communications were of a confidential nature and that the privilege regarding this information has not been waived. Upon review, we find the county attorney’s office has failed to demonstrate the information subject to section 552.022 of the Government Code is protected under the attorney-client privilege. Thus, none of the information subject to section 552.022(a)(17) may be withheld under rule 503 of the Texas Rules of Evidence.

To summarize: The county attorney’s office may withhold the submitted information not subject to section 552.022(a)(17) of the Government Code under section 552.103 of the Government Code. The county attorney’s office must release the court documents subject to section 552.022(a)(17) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 518294

Enc. Submitted documents

c: Requestor
(w/o enclosures)