



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2014

Ms. Ana Vieira
Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2014-10385

Dear Ms. Vieira:

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# 526285 (UT OGC# 155365).

The University of Texas Southwestern Medical Center (the "university") received a request for the requestor's client's employment file; all documents discussing the requestor's client's job performance; all documents pertaining to the basis for the requestor's client's termination; all e-mail communications received by or sent to a specified individual containing specified terms; all agendas, minutes, notes, or handouts for all staff meetings the specified individual conducted; all documents created by the specified individual that discuss or mention the requestor's client from August 1, 2013, to the date of the request; all audio or video recordings made by, or in possession of, the specified individual for any meetings, interviews, or conversations occurring at the university from January 1, 2013, to the date of the request; all documents referenced by a specified attorney in a letter dated March 24, 2014 which pertain to "legitimate, non-discriminatory reasons supporting [the requestor's client's] separation from employment;" and all e-mails sent to or received by the specified individual from August 1, 2013, to the date of the request. You state the university does not

maintain the requested audio or video recordings.¹ You claim the submitted information is excepted from disclosure under section 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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[.]

Gov't Code § 552.022(a)(1). A portion of the submitted information, which we have marked, consists of a completed audit subject to subsection 552.022(a)(1). The university must release the completed audit pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Although you raise sections 552.103, 552.107, and 552.111 of the Government Code for the responsive information, 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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 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 responsive information may not be withheld under section 552.103, 552.107, or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure 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). Thus, we will consider your assertion of the attorney-client privilege and the attorney work

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or 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).

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

product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. We will also consider your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

Texas Rule of Evidence 503 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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You assert the completed audit consists of a communication involving university employees and University of Texas System attorneys. You state this communication was made for the purpose of facilitating the rendition of professional legal services to the university and has remained confidential. Based on your representations and our review, we find the university has established the information subject to section 552.022(a)(1) constitutes an attorney-client communication under rule 503. Thus, the university may withhold this information under Texas Rule of Evidence 503.³

Next, we address your arguments for the submitted information not subject to section 552.022(a)(1) of the Government Code. 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). The 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 is pending or reasonably anticipated on the date that 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). The

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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 that 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.* This office has found that a pending Equal Employment Opportunity Commission (“EEOC”) complaint and a pending complaint filed with the Texas Workforce Commission’s Civil Rights Division (“CRD”) indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that prior to the university’s receipt of the instant request, the requestor issued a demand letter and settlement offer to the university, and the requestor’s client filed a discrimination complaint against the university with the CRD. You also state the requestor has informed the university that his client has filed a complaint with the EEOC, but the university has not yet received notice of this filing. You also state the submitted information is related to the requestor’s client’s claim of discrimination because it pertains to the basis of her claim. Based on your representations and our review, we find the university reasonably anticipated litigation on the date this request was received, and the remaining information is related to the anticipated litigation. Therefore, we conclude section 552.103 of the Government Code is applicable in this instance.

We note, however, that 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* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the anticipated litigation has already seen or had access to some of the information at issue. However, the requestor’s client’s access to this information was only in the usual scope of her employment with the university. Such information is not considered to have been obtained by the opposing party to the litigation and, thus, may be withheld under section 552.103. Accordingly, the university may withhold the remaining information under section 552.103 of the Government Code. We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).⁴

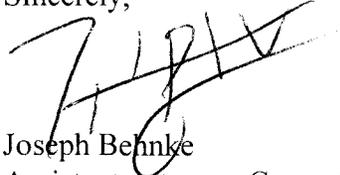
⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

In summary, the university may withhold the information subject to section 552.022(a)(1) of the Government Code, which we have marked, under rule 503 of the Texas Rules of Evidence. The university may withhold the remaining information under section 552.103 of the Government Code until the related litigation concludes or is no longer reasonably anticipated.

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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 526285

Enc. Submitted documents

c: Requestor
(w/o enclosures)