



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 18, 2016

Ms. Diana Shearer
Assistant County Attorney
County of El Paso
500 East San Antonio Avenue, Room 503
El Paso, Texas 79901

OR2016-23437

Dear Ms. Shearer:

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# 630885 (File No. OP-16-250).

The El Paso County Attorney's Office (the "county attorney's office") received a request for information pertaining to a specified case involving the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides 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

¹Although you raise Texas Rule of Civil Procedure 192.5 for some of the submitted information, we note the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002). Further, we note this office has concluded section 552.101 does not encompass discovery privileges. *See* ORD 676 at 1-2.

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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). 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, 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.); ORD 551 at 4. 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim 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.² *See* Open Records Decision No. 555 (1990); *see also* 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. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes

²In addition, this office has concluded 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).

a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, that concurrent with the instant request, the requestor submitted a statement indicating he is seeking the requested information “for a civil action.” However, upon review, we find you have failed to demonstrate the requestor has taken any objective steps toward litigation against El Paso County (the “county”) or the county attorney’s office prior to the county attorney’s office’s receipt of the request. Thus, we conclude you failed to demonstrate the county attorney’s office reasonably anticipated litigation prior to the date it received the present request for information. Accordingly, the county attorney’s office may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). 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)(1)-(2). 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 . . . 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.

You assert the information in Exhibit B-2 consists of privileged attorney work product. You state the information at issue was prepared by an attorney from the county attorney’s office in anticipation of litigation regarding a case presented to the county attorney’s office and contains handwritten attorney notes. You also state the information at issue consists of attorney notes that reflect the mental impressions, opinions, conclusions, and legal theories of an attorney from the county attorney’s office. Based on your representations and our review, we conclude the county attorney’s office may withhold the handwritten notes in Exhibit B-2, which we have marked, under the work product privilege encompassed by section 552.111 of the Government Code. However, we find you have failed to demonstrate any of the remaining information in Exhibit B-2 constitutes privileged attorney work product. Accordingly, the county attorney’s office may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 571.015 of the Health and Safety Code, which provides in pertinent part as follows:

- (a) Each paper in a docket for mental health proceedings in the county clerk’s office, including the docket book, indexes, and judgment books, is a public record of a private nature that may be used, inspected, or copied only under a written order issued by the county judge, a judge of a court that has probate jurisdiction, or a judge of a district court having jurisdiction in the county in which the docket is located.

Health & Safety Code § 571.015(a). Section 571.015 applies only to information in a county clerk’s office. *See id.* The information in Exhibit B-3 is maintained by the county attorney’s office, not by a county clerk’s office. Therefore, Exhibit B-3 is not confidential under section 571.015 of the Health and Safety Code, and the county attorney’s office may not withhold it under section 552.101 on that basis. *See Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).*

In summary, the county attorney's office may withhold the handwritten notes we marked in Exhibit B-2 under section 552.111 of the Government Code. The remaining information must be released to the requestor.³

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/akg

Ref: ID# 630885

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a right of access to some information being released pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) (“[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, if the county attorney’s office receives another request for this information from a different requestor, then the commission should again seek a ruling from this office.