



April 25, 2001

Ms. Patricia A. Adams
Hayes, Coffey & Berry
P.O. Box 50149
Denton, Texas 76206

OR2001-1646

Dear Ms. Adams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146416.

The Town of Trophy Club (the “town”), which you represent, received a written request for certain documents pertaining to the Skyline Drive Reconstruction project (the “road project”). Specifically, the requestor seeks records concerning “Cost Estimates, Reconstruction Design and Estimation” and “Actual Costs, Job Change Orders, Correspondence with contractors, post-construction correspondence (legal and otherwise).” You state that the town has made most of the requested information available to the requestor. You contend, however, that a group of e-mail communications and a portion of a report prepared for the town are excepted from public disclosure under sections 552.103 and 552.107(1) of the Government Code.¹

Section 552.103 is commonly referred to as the “litigation exception.” Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas 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

¹Although you state in your correspondence to this office that the records at issue “are attached hereto as Exhibits ‘E-1 through ‘E-3,’” this office only received documents labeled “E-1” and “E-2.” Accordingly, we will address the public nature of only these two sets of documents.

(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.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). You explain that prior to receiving the records request, the town received a demand letter from an attorney representing a construction company that had previously worked on the road project. The demand letter specifies that if the town did not pay the construction company a certain amount of money within a specified time period, the company would bring a lawsuit against the town. Given these facts, we conclude that you have demonstrated that litigation involving the town was reasonably anticipated on the date the town received the records request. See Open Records Decision No. 555 (1990). Furthermore, after reviewing the e-mail correspondence you submitted to this office, we conclude that these communications "relate" to the litigation for purposes of section 552.103. Accordingly, the town may withhold the e-mail communications at this time pursuant to the litigation exception.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

On the other hand, you state that Exhibit E-2 consists of an excerpt from a completed report prepared for the town regarding the road project. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. See Gov't Code § 552.022(a)(1) ("a completed report, audit, evaluation, or investigation" is public "except as provided by Section 552.108"). Because Exhibit E-2 is part of a "completed report" for purposes of section 552.022(a)(1), this information must be released pursuant to section 552.022 unless the information is expressly made confidential under other law.

Section 552.103 is a discretionary exception that does not make information confidential. See, *e.g.*, Open Records Decision No. 542 (1990) (discussing predecessor statute); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.--Dallas 1999, no pet.). Similarly, section 552.107(1) of the Government Code, which

excepts information within the attorney-client privilege, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). Consequently, the town may not withhold Exhibit E-2 pursuant to either section 552.103 or 552.107(1) of the Government Code.

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

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 layer 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.

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. Tex. R. Evid. 503(a)(5).

Accordingly, 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 document containing privileged information is 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).

After reviewing your brief and the contents of Exhibit E-2, we conclude that you have established that the portion of Exhibit E-2 titled “Project Status” is made confidential under Rule 503 of the Texas Rules of Evidence. Accordingly, the town may withhold this information from the public pursuant to Rule 503.

In summary, the town may withhold the submitted e-mail communications pursuant to section 552.103 of the Government Code. The town may also withhold the portion of Exhibit E-2 titled “Project Status” pursuant to Rule 503 of the Texas Rules of Evidence.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839.

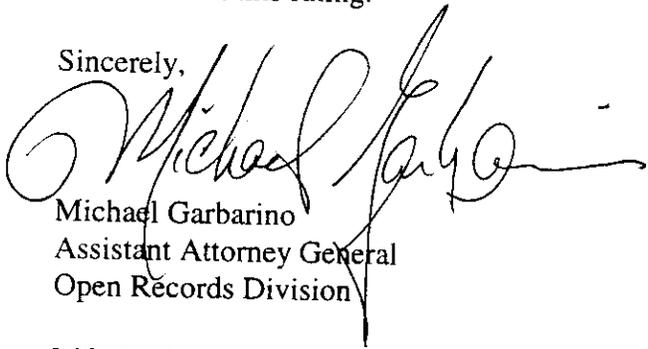
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/RWP/seg

Ref: ID# 146416

Encl. Submitted documents

cc: Mr. Mike Windsor
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(w/o enclosures)