OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 10, 2002

Mr. William R. Crow, Jr.
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2002-3115

Dear Mr. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164057.

The San Antonio Water System ("SAWS") received a request for all documents relating to the requestor's personnel file and termination, including internal audit reports, e-mails, letters from meter vendors, and any other correspondence. Although you indicate that SAWS has identified some responsive information, you also state that SAWS has sought a clarification from the requestor regarding his request. In responding to a request for information, the governmental body must make a good-faith effort to relate the request to the information that it holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). If what information is requested is unclear, the governmental body may ask the requestor to clarify the request. *See* Gov't Code § 552.222(b). Although you indicate that SAWS has sought a clarification, the requestor apparently has not responded to your request. Because the requestor has not responded to the request for a clarification, SAWS need not respond to the portion of the request for which it is seeking clarification. Should the requestor submit such a response, SAWS must seek a ruling from this office before withholding any responsive information from the requestor. *See also* Open Records Decision No. 663 (1999) (providing for tolling of ten business day time limit to request attorney general decision while governmental body awaits clarification). With respect to the information you have identified as responsive to the request, you state that you have made some of the information available to the requestor. You further state that SAWS is withholding documents that are protected by the attorney-client, work-product, and party communication privileges. Finally, you seek a ruling from this office with regard to some of the responsive information, contending that the information is excepted from disclosure under section 552.103 as well as certain privacy interests. We have considered your arguments and reviewed the submitted information.

We first address your statement that SAWS will not provide to the requestor or this office responsive information "protected by attorney-client privilege, the work-product exception to disclosure, or party communication." Under section 552.301 of the Government Code, "[a] governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions." Gov't Code § 552.301(a). Furthermore, a governmental body must provide this office with a copy or representative sample of the information it wishes to withhold as well as comments explaining why the information is protected from disclosure under an exception. *Id.* § 552.301(e). You have not sought a ruling from this office regarding whether the information you claim is protected under the attorney-client, work product, and party communication privileges is within an exception to disclosure. Furthermore, you do not indicate that this office has issued a previous determination allowing SAWS to withhold this information without the necessity of requesting a decision. *See* Open Records Decision No. 673 (2001) (defining "previous determination"). Finally, you have not provided this office with a copy or representative sample of the information you claim to be protected under the attorney-client, work product, and party communication privileges. Because you have not complied with section 552.301 with respect to this information, the information is presumed public. Gov't Code § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not provided arguments to this office for withholding the information at issue and you have not provided this office with a copy of the information, we cannot find that a compelling reason exists for withholding the information. *See* Open Records Decision Nos. 630 at 4-7 (1994) (fact that information falls under attorney-client privilege as incorporated into the Public Information Act by section 552.107 of the Government Code does not provide compelling reason for overcoming presumption of openness), 647 at 5-6 (1996) (section 552.111 of the Government Code incorporates the attorney-work product privilege into the Public Information Act), 473 at 2 (1987) (failure to meet 552.301 requirements waived protections of section 552.111). Therefore, SAWS must release the information you claim is protected under the attorney-client, work-product, and party communication privileges.

Next, we turn to the information you submitted to our office. You contend that the submitted information, which consists of outside vendor information relating to an audit finding, is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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 employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .
>
> (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.

SAWS 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, 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). SAWS must meet both prongs of this test for information to be excepted under 552.103(a).

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). Concrete evidence to support a claim that 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.[1] Open Records Decision No. 555 (1990); *see* 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).

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[1]In addition, this office has concluded that 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).

You State that the submitted information indicates violations of SAWS' gifts and conflicts of interest policies. Because of these possible violations, you state that SAWS is "contemplating filing litigation against and involving the three (3) terminated employees." You further indicate that three terminated employees have filed disciplinary appeals with the SAWS internal appeals committee for review of their termination. You claim that the tenor of correspondence or communications to SAWS following the employees' terminations is also an indication that litigation is reasonably anticipated. However, you do not indicate that, at the time SAWS received the instant request for information, any of the terminated employees had threatened to sue SAWS. Furthermore, you have provided this office with no concrete evidence that either the terminated employees or SAWS has taken concrete steps toward filing a lawsuit. Consequently, we find that you have not adequately demonstrated that the submitted information relates to reasonably anticipated litigation and is therefore excepted from public disclosure under section 552.103 of the Government Code.

You also contend that portions of the submitted information, which you have blacked out, are protected by individuals' privacy interests. We agree that the account numbers you have marked are excepted from disclosure. Section 552.136 of the Government Code provides, in relevant part:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value . . . .
>
> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Thus, SAWS must withhold the account numbers you have marked, as well as additional account numbers we have marked, under section 552.136.

We also note that the submitted documents contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

> (a) Information is excepted from the requirement of Section 552.021 if the information relates to:

> (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
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> (2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, SAWS must withhold the Texas license plate number and vehicle identification number that we have marked under section 552.130.

However, we cannot find that the remainder of the information you have blacked out is protected by privacy interests. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Because you have blacked out the information you contend is private, we are unable to determine whether the information is confidential under either common-law or constitutional privacy. Therefore, SAWS must release the submitted information that is not otherwise protected under sections 552.136 and 552.130. *See* Gov't Code §§ 552.301(e), 552.302; *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)); Open Records Decision Nos. 620 (1993) ("Corporations do not have a right to privacy."); 600 (1992) (public has legitimate interest in financial transaction involving governmental body); 192 (1978) (stating that right of

privacy protects feelings and sensibilities of human beings, and does not protect evaluation report on private college). We caution that the distribution of confidential information is a criminal offense. Gov't Code § 552.352. If you believe that the information you have blacked out is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

In summary, SAWS need not respond to the portion of the request for which you are seeking clarification until the requestor has responded to your request. SAWS must release the responsive information you have withheld under the attorney-client, work-product, and party communication privileges. Finally, SAWS must release the submitted information, except for the account numbers and Texas license plate and vehicle identification numbers.

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).

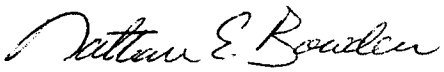
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
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NEB/sdk

Ref: ID# 164057

Enc: Submitted documents

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(w/o enclosures)