



June 28, 2002

Mr. Carvan E. Adkins
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OR2002-3529

Dear Mr. Adkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164997.

The Mental Health Mental Retardation of Tarrant County ("MHMRTC"), which you represent, received a request for copies of documents relating to a specified motor vehicle collision. The requestor also seeks copies of MHMRTC policies, procedures, rules, and/or regulations relating to the manner and by what means vehicles and their operating keys belonging to MHMRTC are secured. You state that you have provided the requestor with some responsive information. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code, as well as pursuant to rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that several of the documents in Attachment C, which we have marked, are accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064. We note that section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information protected from disclosure by other statutes. Section 550.065(b) of the Transportation Code provides that, except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2)

name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *See id.* In this case, the requestor has provided MHMRTC with two or more of the pieces of information required under section 550.065(c)(4). Accordingly, we conclude that MHMRTC must release the marked accident report forms in Attachment C to the requestor.

You claim that portions of Attachment C, as well as the entirety of Attachment E, are excepted from disclosure pursuant to section 552.101 in conjunction with section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Section 58.007 states in pertinent part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Some of the information in Attachment C, as well as the entirety of Attachment E, both of which we have marked, contain law enforcement records pertaining to juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply. Therefore, we conclude that this marked information is confidential under section 58.007 of the Family Code and, thus, must be withheld from disclosure pursuant to section 552.101 of the Government Code.

We also note that some of the information in Attachments C and F is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "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). Another category of public information under section 552.022 is "information in an account, voucher, or contract relating to the

receipt or expenditure of public or other funds by a governmental body[.]” Gov’t Code § 552.022(a)(3). One document in Attachment C that we have marked constitutes a completed investigation. Another document in Attachment F that we have marked constitutes a completed report. We note that both of these documents which were made for MHMRTC must be released to the requestor, unless they are confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Two documents in Attachment F that we have marked constitute vouchers relating to the receipt of public funds by MHMRTC that must be released to the requestor, unless they are confidential under other law. Although MHMRTC claims that this information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions under the Public Information Act and, as such, do not constitute “other law” that makes information confidential.¹ Accordingly, we do not address whether sections 552.103, 552.107, or 552.111 of the Government Code except this information from disclosure.

We note, however, that the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and 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). Therefore, we will determine whether the completed investigation in Attachment C, as well as one of the vouchers in Attachment F that you claim to be protected from disclosure under section 552.111, are confidential under rule 192.5. For purposes of section 552.022, an attorney’s core work product is confidential under rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See id.* Based on our review of your arguments and the investigation in Attachment C, we conclude that this investigation constitutes the work product of an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Accordingly, MHMRTC may withhold the entirety of the completed investigation in Attachment C from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure. However, we find

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

that no portion of the voucher in question constitutes attorney work product. Accordingly, MHMRTC may not withhold any portion of that voucher from disclosure under rule 192.5.

The attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. Therefore, we will determine whether any portion of this same voucher that you also claim to be protected from disclosure under section 552.107 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 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.

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. *See id.* Therefore, in order for information to be withheld 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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the voucher at issue,

we conclude that no portion of this voucher constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, MHMRTC may not withhold any portion of this voucher from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

However, you also claim that this voucher, as well as the other voucher and completed report which are contained in Attachment F, are excepted from disclosure pursuant to section 552.101 in conjunction with section 101.104 of the Civil Practice and Remedies Code. Section 101.104 provides:

- (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].
- (b) Neither the existence nor the amount of the insurance is subject to discovery.

Tex. Civ. Prac. & Rem. Code § 101.104; *see In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999) (statute “prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, under the [Texas Tort Claims] Act”). We note that section 101.104 consists of “other law” for purposes of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, based on our review of your arguments and the two vouchers and completed report in Attachment F, we find that MHMRTC has not sufficiently demonstrated that this discovery provision applies to any portion of that information. Accordingly, we conclude that MHMRTC may not withhold any portion of this information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code. Consequently, MHMRTC must release the entirety of the completed report in Attachment F to the requestor.

However, we note that the two vouchers in Attachment F contain bank account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent 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; or
 - (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(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. Accordingly, we conclude that MHMRTC must withhold the bank account numbers in the vouchers in Attachment F that we have marked from disclosure pursuant to section 552.136 of the Government Code. However, MHMRTC must release the remaining portions of these two vouchers to the requestor.

You claim that the remaining information in Attachments C and F, as well as the entirety of Attachments H, I, and J are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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). MHMRTC maintains 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 receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). MHMRTC must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See 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.² *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be “realistically contemplated”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). Upon review of your arguments and the remaining information at issue, we find based on the totality of circumstances that MHMRTC has demonstrated that litigation was reasonably anticipated by MHMRTC on the date that it received the request and that the information is related to the reasonably anticipated litigation for purposes of section 552.103. Accordingly, we conclude that MHMRTC may withhold the remaining information in Attachments C and F, most of the information in Attachment H, as well as the entirety of Attachments I and J from disclosure pursuant to section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.³ We note that some of the documents in Attachment H have been seen by the potential opposing party in this matter. Accordingly, we conclude that MHMRTC may not withhold any portion of these documents from disclosure pursuant to section 552.103 of the Government Code. Consequently, MHMRTC must release these particular documents to the requestor. Because we base our ruling on the above-noted exceptions to disclosure, we need not address your remaining claim regarding section 552.117 of the Government Code.

In summary, MHMRTC must release the marked accident report forms in Attachment C to the requestor. MHMRTC must withhold the information in Attachment C, which we have marked, as well as the entirety of Attachment E pursuant to section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. MHMRTC may withhold the entirety of the completed investigation in Attachment C from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure. MHMRTC must release the entirety of the completed report in Attachment F to the requestor. MHMRTC must withhold the bank account numbers in the vouchers in Attachment F that we have marked from disclosure pursuant to section 552.136 of the Government Code. MHMRTC must release the remaining portions of the two vouchers in Attachment F to the requestor. MHMRTC must release to the requestor the documents in Attachment H that have been seen by the

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

³ We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

potential opposing party in this matter. MHMRTC may withhold the remaining information in Attachments C, F, and H, as well as the entirety of Attachments I and J, from disclosure pursuant to section 552.103 of the Government Code.

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).

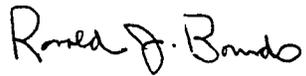
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 164997

Enc. Marked documents

cc: Ms. Zoe Courtney
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(w/o enclosures)