



August 5, 2002

Ms. Beverly West Irizarry
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2002-4290

Dear Ms. Irizarry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166645.

The Alamo Community College District (the “district”), which you represent, received a request for the employment records, including the entire personnel file, of the requestor’s client. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

First, we note that section 552.301 provides in relevant part that “[t]he governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information].” Gov’t Code § 552.301(b). You did not timely raise section 552.107 as an exception to disclosure. Therefore, as section 552.107 is a discretionary exception that may be waived by a governmental body, we conclude that you may not withhold the information under section 552.107. *See* Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107).

Next, we note that a portion of the submitted information is subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (5). The submitted documents include completed evaluations, which are subject to section 552.022(a)(1). Furthermore, some of the submitted documents appear to be working papers used to estimate the expenditure of public funds by a governmental body. If the estimates associated with these documents have been completed, the documents are public under section 552.022(a)(5). As prescribed by section 552.022, the documents that are subject to section 552.022(a)(1) must be released to the requestor unless they are confidential under other law or excepted under section 552.108. Further, the district may not withhold the documents that are subject to section 552.022(a)(5) if the estimates associated with these documents have been completed, unless such information is confidential under other law. You did not raise section 552.108. Section 552.103 is a discretionary exception under the Public Information Act and is therefore not "other law" that makes the information we have marked confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). *See also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the information subject to subsections 552.022(a)(1) and 552.022(a)(5) which we have marked (see red and orange flags, respectively), may not be withheld under section 552.103.

Although the district waived section 552.107, we note that 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*, 53 S.W.3d 328 (Tex. 2001).

Thus, we will determine whether the information subject to section 552.022 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 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). Upon review of the information at issue and your arguments, we conclude you have not demonstrated that the information subject to section 552.022 is made

confidential under the attorney-client privilege. Therefore, all of the information subject to section 552.022 that we have marked must be released to the requestor, with the following possible exception.

We note that the completed evaluations which must be released under section 552.022(a)(1) contain the social security number of the individual who is the subject of the evaluation. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' social security number. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. For those employees who did not timely elect to withhold their social security number, we note that a social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We note, however, that the requestor here is the attorney representing the employee whose personnel information is at issue. In this instance, therefore, the requestor has a special right of access to information about his client. *See* Gov't Code § 552.023 (person's authorized representative has a special right of access to information that is protected by laws intended to protect person's privacy). Thus, the social security number of the requestor's client must not be withheld from the information to be released.¹

For the remainder of the submitted information not subject to section 552.022, we will address your argument under section 552.103. Section 552.103 of the Government Code provides as follows:

¹Because the information to be released under section 552.023 may be confidential with respect to the general public, if the district receives a future request for this information from an individual other than the requestor or her authorized representative, the district should again seek our decision.

(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.

The district 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. *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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the individual whose records are at issue in this case filed suit against the district in the 166th Judicial District Court of Bexar County, Texas on October 1, 2001 alleging employment discrimination. You have submitted for our review Plaintiff's Original Petition filed in this suit. You state that this case is currently in the discovery stage. On this basis, we find that you have met the first prong of the section 552.103 test. Upon review of the information you have submitted as responsive to the request, we find that this information is related to the pending litigation. Therefore, the information submitted as responsive to the request may be withheld under section 552.103 of the Government Code.

However, we note that the opposing party has had access to most of the information in his personnel file. 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 litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, the district may withhold the submitted information under section 552.103, with the exception of the information we have marked to be released under section 552.022 and information that has either been obtained from or provided to the opposing party in the litigation. Social security numbers contained in the information to be released must be withheld under section 552.117 if the individuals to whom these numbers belong made a timely election to keep these numbers confidential, or if these numbers were obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. The social security number of the requestor's client must be released to the requestor.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 166645

Enc. Submitted documents

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