



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2004

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2004-1846

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197486.

The Texas Education Agency (the "agency") received a request for several categories of information relating to the requestor's driving safety course. You claim that some of the information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We assume that, to the extent other information responsive to the instant request existed on the date of the agency's receipt of this request, it has been released to the requestor. If not, you must release it immediately. *See* Gov't Code §§ 552.006, .301,.302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). We have reviewed the representative sample of information you submitted and considered the exceptions you claim.¹

Initially, we note that portions of the submitted information found in Exhibits 3 and 5 constitute information from a completed investigation made of, for, or by the agency. Section 552.022 of the Government Code provides in part that "a completed report, audit,

¹ We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

evaluation, or investigation made of, for, or by a governmental body” constitutes “public information...not excepted from required disclosure...unless...expressly confidential under other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You assert instead that the section 552.022 information may be withheld pursuant to sections 552.103, 552.107, and 552.111 of the Government Code. However, these are discretionary exceptions to disclosure that protect the governmental body’s interests and are therefore not “other law” that makes information confidential for purposes of section 552.022(a). *See 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); Open Records Decision No. 677 at 4 (2002) (section 552.107 is not “other law” for purposes of section 552.022); 473 (1987) (governmental body may waive predecessor to section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, you may not withhold any of the submitted information encompassed by section 552.022 under section 552.103, 552.107, or 552.111.

However, the Texas Supreme Court has determined that the “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); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). This office has determined that when the attorney-client privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under rule 503 of the Texas Rules of Evidence. *See* Open Records Decision No. 676 at 5-6. We will therefore consider whether the section 552.022 information found in Exhibit 3 may be withheld under rule 503.

Rule 503(b)(1) provides as follows:

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(b)(1). 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.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information 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 communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information). Having considered your representations and reviewed the section 552.022 information at issue, we conclude that you have established that this information constitutes privileged attorney-client communications that are protected under rule 503 and may be withheld. We have marked this information accordingly.

We note however, that a portion of the information found in Exhibit 5 that is subject to section 552.022 consists of e-mail addresses of members of the public that are confidential pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Thus, the agency must withhold the e-mail addresses we have marked under section 552.137(a), unless it has received consent for release from the individuals whose addresses are at issue. The remaining information we have marked as section 552.022 information in Exhibit 5 must be released.

We now address your section 552.103 claim with respect to the remaining information in Exhibit 5 that is not subject to section 552.022. Section 552.103 provides in 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must

demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the potential opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

In this instance, you inform us that the Driver Training Division of the agency sent the requestor a “notice of intent to revoke course provider license.” You state that the requestor was offered a settlement agreement that would have allowed him to operate as a licensed driving course provider as long as he operated in compliance with the applicable law and rules. You further explain that the requestor has previously agreed to these settlement terms. However, in this case, you state that the requestor failed to sign the settlement agreement. You also state that the “[a]gency is going to revoke [the requestor’s] course provider license[.]” Thus, you assert that “litigation is more than ‘reasonably anticipated,’ it is inevitable.”

Based on your representations, we find that you have established that litigation was reasonably anticipated on the date the agency received this request for information. We also find that the information in Exhibit 5 that is not subject to section 552.022 relates to the anticipated litigation. We therefore conclude that the agency may withhold the information found in Exhibit 5 that is not subject to section 552.022 at this time under section 552.103 of the Government Code. We have marked this information accordingly.

In reaching this conclusion, we assume that the agency does not seek to withhold information that the opposing party to the anticipated litigation already has seen or to which the opposing party already has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing the opposing party to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, information to which the opposing party already has had access thru discovery or otherwise, may not be withheld from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your section 552.107 claim with respect to the information found in Exhibit 3 that is not subject to section 552.022. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “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.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Upon review of your representations and the communications at issue, we conclude that you have demonstrated that the information at issue constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the agency. Accordingly, the agency may withhold the information we have marked in Exhibit 3 under section 552.107(1) of the Government Code.

We now address your section 552.101 claim with respect to the information found in Exhibit 6. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies. It also protects the identities of individuals who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 2 (1981)*, citing *Wigmore, Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988)*. Furthermore, as its purpose is to protect the flow of information to the governmental body, rather than to protect the interests of the person who furnishes the information, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See Open Records Decision Nos. 630 at 4 (1994), 549 at 6 (1990)*.

You assert that the submitted information in Exhibit 6 should be withheld to protect the identities of informants. However, you do not specify what laws were reported to be allegedly violated, nor do you state that such violations are subject to criminal or civil penalties. We therefore conclude that the agency may not withhold any of the submitted information in Exhibit 6 pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege. Thus, the information in Exhibit 6 must be released to the requestor in its entirety.

In summary, the agency may withhold the information we have marked in Exhibit 3 under rule 503 of the Texas Rules of Evidence. The agency may withhold the remainder of the information in Exhibit 3 pursuant to section 552.107 of the Government Code. The information we have marked in Exhibit 5 may be withheld under section 552.103 of the Government Code. The agency must withhold the information we have marked in Exhibit 5

under section 552.137 of the Government Code, unless it has received consent for release from the individuals whose addresses are at issue. The remaining submitted information 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 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 197486

Enc. Submitted documents

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