



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2007

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P. O. Box 220
Austin, Texas 78767-0220

OR2007-01735

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 271459.

The Lower Colorado River Authority (the "authority") received a request for all documents, emails, worksheets, notes, and discussion items that reference the requestor, as well as the requestor's personnel files. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that some of the submitted information indicates that it was created after the request for information was received. This information, which we have marked, is thus not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the authority is not required to release that information in response to the request.

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Next, we note that portions of the submitted information are subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) 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 Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed employee evaluations. Therefore, as prescribed by section 552.022, the authority must release this information unless it is confidential under other law. Although the authority raises section 552.103 of the Government Code for this information, this exception is discretionary under the Act, and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the authority may not withhold this information under section 552.103. Instead, this information, which we have marked, must be released to the requestor.

Next, we address your claim under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in relevant part 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.

...

(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 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and have provided documentation reflecting, that the requestor filed claims of discrimination with the Enforcement Agencies, which consist of the Texas Workforce Commission and the Equal Employment Opportunity Commission (the "EEOC"), prior to the date of the authority's receipt of this request for information. This office has stated that a *pending* EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982). You also state that the remaining information is related to the requestor's discrimination claims. Therefore, based on your representations and the submitted documentation, we find that the authority reasonably anticipated litigation on the date of its receipt of this request. We also find that the remaining information is related to the anticipated litigation. Thus, we agree that the authority may generally withhold the remaining information under 552.103 of the Government Code.

We note, however, that some of the documents at issue reflect on their face that they were provided to or obtained from the opposing party in the anticipated litigation. 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, to the extent that the remaining information has either been obtained from or provided to the opposing party or her representative, it is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. However, to the extent that the remaining information has not been obtained from or provided to the opposing party or her representative, it may be withheld from disclosure under section 552.103(a). Furthermore, the applicability of section 552.103(a) ends once litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we note that some of the records not subject to section 552.103 constitute medical records subject to the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. Information subject to the MPA includes both medical records and information obtained from those medical records. See Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. Such records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Upon review of the remaining information, we have marked the records that are governed by the MPA and may only be released in accordance therewith.

Next, we note that some of the remaining records contain information that was created for purposes of the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. This section is also encompassed by section 552.101 of the Government Code.² Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find that the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to the information. Thus, we

²Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

conclude that the authority must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

To the extent that the remaining information in Exhibit B-2 is not excepted from disclosure by section 552.103 of the Government Code, we address your claim under section 552.107 of the Government Code. Section 552.107(1) 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 Tex. 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 a 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).

You state that the remaining information in Exhibit B-2 consists of correspondence between authority attorneys and employees. You indicate that these communications were made for the purpose of facilitating the rendition of professional legal services. However, we find that the records at issue consist of correspondence between the requestor and the authority. Thus, you have failed to establish that the remaining information constitutes confidential

communications between privileged parties. Accordingly, the authority may not withhold any of the remaining information under section 552.107.

Next, we address your claim under section 552.111 of the Government Code for the remaining information in Exhibit B-2. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This section encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *See id.*; Open Records Decision No. 677 at 6-8.

You claim that the remaining records in Exhibit B-2 constitute attorney work product under section 552.111 because they were created after the requestor threatened litigation, and they “reveal the mental processes, conclusions and legal theories of [authority] attorneys.” However, as the records at issue were created by the requestor, we find that section 552.111 does not apply. We therefore conclude that the authority may not withhold any of the remaining information on the basis of the attorney work product privilege under section 552.111.

Next, we note that the remaining information includes a bank account number. Section 552.136 of the Government Code states that “[n]otwithstanding 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, the authority must withhold the bank account number, which we have marked, under section 552.136.

Finally, we note that the remaining information includes an e-mail address. Section 552.137 of the Government Code provides:

(a) 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.

Id. `§ 552.137. Section 552.137 does not apply to a public employee's governmental e-mail address or a business's general e-mail or web page address. You do not inform us that any member of the public has affirmatively consented to the release of the e-mail address at issue. The authority must, therefore, withhold the e-mail address that we have marked under section.

In summary, the information we have marked under section 552.022(a)(1) of the Government Code must be released to the requestor. To the extent that the remaining information has not been obtained from or provided to the opposing party or her representative, it may be withheld from disclosure under section 552.103(a) of the Government Code. The medical records we have marked may only be released in accordance with the MPA. The authority must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the FMLA. The authority must also withhold the marked bank account number under section 552.136 of the Government Code and the marked e-mail address under section 552.137 of the Government Code. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

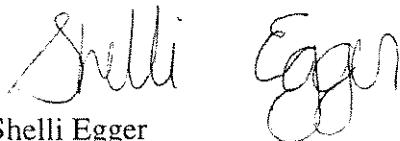
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Office of the Attorney General 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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/krl

Ref: ID# 271459

Enc. Submitted documents

c: Ms. Connie Constancio
c/o Derek A. Howard
Howard & Kobelan
100 Congress, Suite 1720
Austin, Texas 78701
(w/o enclosures)