



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2009

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2009-14682

Dear Ms. Rodriguez:

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# 358578.

The Northside Independent School District (the "district"), which you represent, received a request for information pertaining to a grievance and allegations filed by a named individual, the requestor's human resources file with the district, and recordings of three hearings related to the requestor's grievance. You state the district will release the requested hearing recordings to the requestor. You claim that the submitted 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.

You argue that some of the submitted information, which you marked, is not responsive to the instant request for information because it is unrelated to the named individual or the requestor. Upon review, we agree, and this ruling does not address the public availability of the information you marked that is not responsive to the request. Thus, the district is not required to release this information in response to this request.

Some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant 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[;]

...

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

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (5), (15). The responsive information includes a completed evaluation of the requestor made by the district which is expressly public under section 552.022(a)(1). The responsive information also includes several salary evaluation worksheets and calculation forms that were used by the district to estimate initial salary levels or salary increases for district employees. The submitted documents reflect that the salaries or pay increases to which these documents relate were awarded. Therefore, these worksheets are subject to section 552.022(a)(5). You also submitted some job announcements/postings and a staff directory for the district's technology services department as responsive to this request. Because these documents are or were made available to the public on the district's website, we conclude the district regards them as public. Accordingly, the job announcements/postings and staff directory are subject to section 552.022(a)(15).

Generally, the district may only withhold information subject to section 552.022 if it is expressly confidential under "other law." *Id.* § 552.022(a). You claim all of these documents are excepted under section 552.103 and that some of them are privileged under section 552.107. However, sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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 Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at n.5 (2000) (discretionary exceptions generally). As such, these sections are not "other law" that make information confidential for purposes of section 552.022. Therefore, the district may not

withhold the documents we marked that are subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. However, in addition to section 552.107, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the applicability of rule 503 to the documents you assert are protected by the attorney-client privilege that are also subject to section 552.022. However, because you only assert section 552.103 for the remaining documents subject to section 552.022, these documents must be released.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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(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. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The remaining documents subject to section 552.022 were sent from the district to an individual you identify as the district's outside counsel, regarding the named individual's grievance. You also explain this information was communicated in the context of addressing legal business, including litigation, public information requests, and personnel matters. Based on your representations and our review, we agree these documents are part of a privileged attorney-client communication. Thus, the district may withhold them under Texas Rule of Evidence 503.

We next turn to your claim under section 552.103 of the Government Code for the remaining responsive 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To establish 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state, and provide documentation showing, the requestor filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against the district, alleging discrimination based on race and gender. 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). Based on our review of the submitted EEOC complaint, we agree the district reasonably anticipated litigation on the date it received the present request for information. We agree the requestor's human resources file relates to this anticipated litigation. Additionally, you have shown that the pending litigation initiated by the named individual is related to the requestor's EEOC complaint. However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, once information is obtained from or provided to all the opposing parties in the anticipated litigation, there is no interest in withholding that information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Some of the documents in the requestor's personnel file reflect they were obtained from or provided to the requestor in the context of the requestor's employment or in response to prior open records requests. These documents may not be withheld under section 552.103. We have, however, marked the information the district may withhold under section 552.103 of the Government Code.¹ We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You next assert that some of these remaining documents are excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a *confidential* communication, 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." ORD 676.

¹As our ruling is dispositive for this information, we need not address your arguments under section 552.107 or section 552.111 to withhold this information.

You claim some of the remaining documents are privileged under the attorney-client privilege. However, as noted above, these documents were obtained from or provided to the requestor, who is not a privileged party. We find you have failed to explain how these documents were between or among privileged parties, and they may not be withheld under section 552.107.

The remaining information includes the requestor's medical records governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code.² Section 159.002 of the MPA provides in part:

(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(a)-(c). Medical records must be released on 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. *See id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See* Occ. Code § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the requestor's medical records that are subject to the MPA. The district must release these records to the requestor upon receipt of the proper consent.

Finally, some of the remaining information may be subject to section 552.137, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we marked do not appear to be excepted under subsection (c). Accordingly, unless the owners of the e-mail addresses we

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

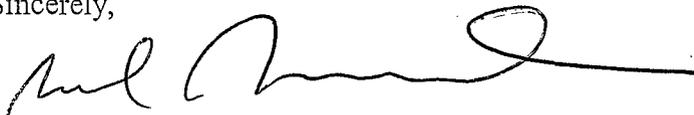
marked have consented to their release, the district must withhold these e-mail addresses under section 552.137.

In summary, the district may withhold the documents we marked under Texas Rule of Evidence 503, as well as the documents we marked under section 552.103 of the Government Code. The medical records we marked under the MPA must be released to the requestor upon the district's receipt of the proper consent. The district must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the e-mail addresses have consented to their release. The remaining responsive information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 358578

Enc. Submitted documents

cc: Requestor
(w/o enclosures)