



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 31, 2009

Ms. Helen Valkavich
Mr. David B. Casas
Assistant City Attorneys
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2009-18476

Dear Ms. Valkavich and Mr. Casas:

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# 365898 (City of San Antonio ORR# 09-1263).

The City of San Antonio (the "city") received a request for information related to reasonable accommodation requests made by the requestor within a specified time frame. You inform us that the city sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state that the city will release some responsive information to the requestor. You claim that the submitted 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 id.* § 552.304 (interested party may submit comments stating why information should or should not be released).

We first address the requestor's argument that she has a right of access to the requested information under section 552.102 of the Government Code. In support of this assertion, the requestor relies on a sentence in section 552.102(a), which states in part "that all information in the personnel file of an employee of a government body is to be made available to that employee or the employee's designated representative as public information is made available under [the Act]." *Id.* § 552.102(a). The purpose of section 552.102 is to except

from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy. The language in section 552.102(a) on which the requestor relies is intended to allow a person or person’s authorized representative a right of access to information relating to the person that is protected from public disclosure for the purpose of protecting that person’s privacy interests. *See* Gov’t Code § 552.102(a); *see also, e.g., id.* § 552.023.

Because the requestor has a special right of access to information implicating her privacy interests, the city would not be able to withhold such information on the basis of either common-law privacy or section 552.102. In this instance, however, the city claims that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. The purpose of section 552.103 is not to protect the privacy interests of any individual, but rather to protect a governmental body’s interests in situations involving litigation. *See id.* § 552.103. The purpose of section 552.107 is not to protect the privacy interests of any individual, but rather to protect a governmental body’s interest in privileged attorney-client communications. *See id.* § 552.107. Access provisions that apply to information subject to laws intended to protect a person’s privacy interests (including the language in section 552.102(a) on which the requestor relies) are not relevant in determining whether information is excepted from required public disclosure under sections 552.103 or 552.107. As such, we will address the city’s arguments regarding these exceptions.

We next note that some of the submitted information may have been subject to a previous request, as a result of which this office issued Open Records Letter No. 2008-04824 (2008). In that ruling, we determined that the city (1) must release any information related to a specific request letter, (2) must release the job posting and job description we marked under section 552.022(a)(15) of the Government Code, and (3) may withhold the remaining submitted information under section 552.103 of the Government Code. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude that the city must rely on Open Records Letter No. 2008-04824 as a previous determination and continue to treat any previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (outlining elements of first type of previous determination). To the extent the submitted information was not previously ruled upon, we will consider your arguments against disclosure.

We note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

[T]he 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;

...

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

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (15), (18). The submitted information contains completed employee performance evaluations subject to section 552.022(a)(1). The city must release the evaluations, which we have marked, unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law. The submitted information also contains a job posting and job description, which are subject to section 552.022(a)(15), and a settlement agreement to which the city is a party, which is subject to section 552.022(a)(18). The city must release this information, which we have marked, unless it is expressly confidential under other law. Although you raise sections 552.103 and 552.107 of the Government Code as exceptions against disclosure of the information subject to section 552.022, these are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *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); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, neither section 552.103 nor section 552.107 is "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022 under section 552.103 or section 552.107. However, the Texas Supreme Court has held that the 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). The attorney-client privilege is also found at Texas Rule of Evidence 503. Accordingly, we will consider the applicability of rule 503 to all of the information subject to section 552.022.

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).

In this instance, some of the information that is subject to section 552.022 of the Government Code is attached to information that you seek to withhold as privileged attorney-client communications. You state that these attachments were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications were

intended to be and have remained confidential. Based on your representations and our review, we agree that the information subject to section 552.022 is contained within attorney-client communications that are privileged under rule 503. Therefore, the city may generally withhold this information under rule 503. However, to the extent the information subject to section 552.022 also exists separate and apart from the submitted privileged communications, the city may not withhold this information under rule 503.

We next consider your arguments against disclosure of the information that is not subject to section 552.022. Section 552.103 of the Government Code provides in relevant 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). The city 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, 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). To establish that 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. *Id.* at 4. This office has determined that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates that litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that on June 9, 2009, the requestor filed an EEOC complaint against the city alleging discrimination and retaliation. Based on your representation and our review of the submitted EEOC complaint, we agree that the city reasonably anticipated litigation on the date it received the present request for information.

The submitted EEOC complaint alleges that the city discriminated against the requestor on the basis of disability by refusing certain reasonable requests for accommodation. You assert that the submitted documents pertain to the requestor's requests for reasonable accommodation and, therefore, directly relate to her EEOC claim. Based on your representations and our review, we agree that the submitted information relates to litigation that the city anticipated on the date it received the present request for information. Therefore, section 552.103 is generally applicable to the remaining information at issue.

However, if a potential opposing party has, through discovery or otherwise, seen or had access to information that is related to anticipated litigation, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982). As such, the city may not withhold under section 552.103 any documents that the requestor has previously had access to or seen. We further note that the applicability of section 552.103(a) ends once litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). We note either the requestor or her attorney has previously had access to or seen some of the information that is not subject to section 552.022. Thus, with the exception of the information the requestor or her attorney has previously had access to or seen, the city may withhold the information not subject to section 552.022 under section 552.103. We will consider your argument under section 552.107 of the Government Code for information not subject to section 552.022 that the requestor or her attorney has previously had access to or seen.

Section 552.107(1) protects information that comes 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.

Most of the information the requestor or her attorney has previously had access to or seen is contained within or attached to e-mail strings transmitted between city attorneys and other city employees, all of whom you have identified. You state that these communications were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications were intended to be and have remained confidential. Based on your representations and our review, we agree that most of the remaining information at issue is contained within privileged attorney-client communications. As noted above, the

requestor or her attorney has previously had access to or seen this information. Accordingly, this information has been shared with non-privileged parties. To the extent this information does not exist separate and apart from the submitted privileged e-mail strings, the city may withhold this information under section 552.107. To the extent this information does exist separate and apart from the submitted privileged e-mail strings, such information is not privileged under section 552.107 and the city may not withhold this information on that basis. We have also marked for release information that the requestor or her attorney has previously had access to or seen that is not contained within a privileged attorney-client communication.

We note that some of the non-privileged information, which we have marked, is subject to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. Section 552.101 encompasses the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. 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). We have marked information that is confidential under section 825.500 of title 29 of the Code of Federal Regulations. We find that none of the release

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987); 480 (1987), 470 (1987).

provisions of the FMLA apply to this information. Thus, we conclude that the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

We note that some of the remaining non-privileged information is subject to the Americans with Disabilities Act (the "ADA"), which section 552.101 also encompasses. The ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The EEOC determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). We have marked information that is confidential under the ADA; the city must withhold this information under section 552.101 of the Government Code.

The remaining non-privileged information also contains information that is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. *See* Occ. Code § 151.001-165.160. Section 159.002 of the MPA provides in relevant part:

(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.

Id. § 159.002(b), (c). Medical records must be released on the patient's signed, written consent, provided that the consent specifies the (1) information to be covered by the release, (2) reasons or purposes for the release, and (3) 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 id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records in the submitted information that may be released only in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

In summary, (1) the city must rely on Open Records Letter No. 2008-04824 as a previous determination and continue to treat any previously ruled upon information in accordance with that ruling, (2) the city may withhold the information we have marked pursuant to section 552.022 under Texas Rule of Evidence 503, except the city must release this information to the extent it also exists separate and apart from the submitted privileged communications, (3) with the exception of any information the requestor or her attorney has previously had access to or seen, the city may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code. To the extent the information the requestor or her attorney has previously had access to or seen does not exist separate and apart from the submitted e-mail strings, the city may withhold such information under section 552.107 of the Government Code. To the extent this information does exist separate and apart from the submitted e-mail strings, the city must nevertheless withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA and ADA, and may release the information that we have marked under the MPA only in accordance with the MPA. The city must release the remainder of the submitted information.²

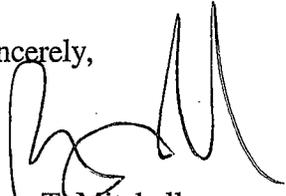
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

²We note that the information to be released contains information that would be confidential with regard to the general public, but to which the requestor has a right of access under section 552.023 of the Government Code. Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a). Should the city receive another request for this information from a different requestor, the city must again seek a decision from this office.

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,

A handwritten signature in black ink, appearing to read 'R. Mitchell', with a large, stylized initial 'M'.

Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/sdk

Ref: ID# 365898

Enc. Submitted documents

c: Requestor
(w/o enclosures)