



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2010

Mr. Bret L. Strong
The Strong Firm
For The Woodlands Township
10003 Woodloch Forest Drive, Suite 210
The Woodlands, Texas 77380

OR2010-05549A

Dear Mr. Strong:

This office issued Open Records Letter No. 2010-05549 (2010) on April 19, 2010. In that ruling, we concluded The Woodlands Township (the "township") waived its claims under sections 552.103, 552.107, and 552.111 of the Government Code because the township failed to comply with the requirements of section 552.301(e) of the Government Code by not submitting a copy of the written request for information or the subsequent clarified request for information. You have asked us to re-examine our ruling because you contend, and have provided an affidavit stating, the township submitted via facsimile copies of the written request and the clarified request with the township's original request for a ruling. Based on your representations and our review, we now find the township complied with section 552.301 of the Government Code. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on April 19, 2010. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 384435 (previous ID# 376250).

The township, which you represent, received a request for all records pertaining to a specified incident.¹ You claim the requested information is not subject to the Act. Alternatively, you claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence.² We have considered your arguments and reviewed the submitted representative sample of information.³

Initially, you assert the requested information is not subject to the Act because the information was created and maintained by a private, non-profit organization and, therefore, does not pertain to the affairs of a governmental body or the official acts of public officials and employees. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

¹You state, and provide documentation showing, the township sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²Although you also raise section 552.101 of the Government Code in conjunction with, among other things, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we will consider your assertion of the attorney work product privilege under only section 552.111 of the Government Code.

³We 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.

You explain the requested information pertains to an incident at a 2008 triathlon that was organized and run by The Woodlands Recreation Centers, Inc. (the "WRC"), a private, non-profit organization that handled certain functions and services for The Woodlands community. You have provided contract documents reflecting that, prior to the 2008 triathlon and incident at issue, the township and the WRC entered into a transition agreement to begin the process of the township taking over the functions, duties, obligations, and services of the WRC in order to consolidate and stream-line the functions and services into one community-wide governmental organization. You have also informed us, and provided contract documents reflecting, the township took assignment of all contracts and assumed all rights and responsibilities of the WRC as of January 1, 2010. In subsequent communications with this office, you explained the township will be responsible for, among other things, all aspects of managing and running the 2010 triathlon, and is legally obligated to continue executing the terms of the triathlon sponsorship agreements entered into by the WRC. You do not explain, nor do the contract documents reflect, the township does not own or have a right of access to the WRC's historical records pertaining to past triathlons. Furthermore, we note you have submitted the WRC's historical records pertaining to the 2008 triathlon as responsive to the present request. Although the WRC's 2008 triathlon records were originally created and maintained by a private organization, based on your representations and our review of the provided contract documents, we find the township collected and is maintaining, or has a right of access to, those records for the purpose of running the 2010 and future triathlons. As such, the requested records pertain to the transaction of official business of the township and are subject to the Act. *See* Gov't Code § 552.002(a). Consequently, we will consider your claimed exceptions to disclosure for the submitted information.

Next, we note a portion of the information submitted as Exhibit 3 is subject to section 552.022(a)(1) of the Government Code, which provides:

~~the following categories of information are public information and not excepted from required disclosure under [the Act] 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[.]~~

Id. § 552.022(a)(1). Exhibit 3 contains a completed incident report, which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Although you claim the completed incident report is excepted from disclosure by the attorney-client privilege under section 552.107 of the Government Code, this section is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002)

(attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, this section does not make information confidential for the purposes of section 552.022. Therefore, the township may not withhold the incident report under section 552.107 of the Government Code. However, 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, 337 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of this privilege under rule 503 for the completed incident report. We will also consider your arguments under sections 552.101, 552.103, 552.107, 552.111, and 552.137 for the remaining information not 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).

You generally assert the completed incident report in Exhibit 3 is protected by the attorney-client privilege. As previously noted, however, you state the information was created and maintained by the WRC. You have not explained, or otherwise demonstrated, how the report constitutes a confidential attorney-client communication involving the township. Therefore, we find you have failed to establish the applicability of the attorney-client privilege to the report. Consequently, the incident report in Exhibit 3 may not be withheld under Texas Rule of Evidence 503. As you have claimed no other exceptions to disclosure for this information, it must be released.

We now address your arguments for the remaining information not subject to section 552.022. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information that other statutes make confidential, such as the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the

supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Although you generally assert any medical records responsive to the request are confidential, none of the submitted information constitutes medical records or information obtained from medical records for purposes of the MPA. Therefore, none of the requested information may be withheld on the basis of the MPA.

Section 552.101 also encompasses chapter 773 of the Health and Safety Code, which pertains to emergency medical service ("EMS") records. Section 773.091 provides in relevant part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). You generally assert any EMS or ambulance records responsive to the request are confidential. The information submitted as Exhibit 1 contains an e-mail from an emergency medical technician summarizing certain events and actions involving EMS personnel during the incident specified in the request. It appears some of the information in this e-mail was obtained from records created by EMS personnel pertaining to the evaluation and treatment of a patient. We have marked the information that constitutes information obtained from confidential EMS records. The marked information must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. *Cf.* ORD 598 (noting information obtained from confidential medical records also subject to laws pertaining to such records).

Section 552.103 of the Government Code 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(a) to the information that it seeks to withhold. 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 contend the requestor is seeking the witness statements submitted as Exhibit 2 to pursue a potential claim against the township. We again note, however, you state the information was created and maintained by the WRC. You also inform us the township was not involved in any way with the incident at issue in the witness statements. You have not, however, explained how the township would be a party to litigation involving information created and maintained by the WRC. Consequently, we find you have not established the township reasonably anticipated litigation when it received the request for information. Accordingly, the township may not withhold any part of Exhibit 2 under section 552.103 of the Government Code. As you have raised no other exceptions to disclosure for the information in Exhibit 2, it must be released.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. See Gov't Code § 552.107(1). 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). The elements of the privilege under section 552.107(1) are the same as those for rule 503 outlined above.

You generally assert the remaining e-mails and incident debriefing notes in Exhibit 3 are protected by the attorney-client privilege. As previously noted, however, you state the information was created and maintained by the WRC, and you have not explained, or otherwise demonstrated, how the report constitutes a confidential attorney-client communication involving the township. Therefore, we find you have failed to establish the applicability of the attorney-client privilege to the remaining information in Exhibit 3, and this information may not be withheld under section 552.107 of the Government Code. As you have claimed no other exceptions to disclosure for this information, it must be released.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency,” and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Gov't Code § 552.111; *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 work product as:

(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 seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

Although you generally assert some of the remaining information is protected by the attorney work product privilege, you have not provided any arguments explaining how any part of this information, which you state was created and maintained by the WRC, was created or developed for trial or in anticipation of litigation involving the township. Consequently, you have failed to demonstrate the applicability of the attorney work product privilege to any of the remaining information. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code.

You claim some of the remaining information is protected under section 552.137 of the Government Code, 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). Gov't Code § 552.137(a)-(c). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked in the

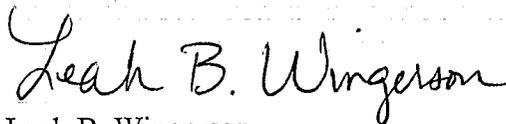
~~remaining information are not specifically excluded by section 552.137(c) and are not institutional, Internet website, or a governmental entity's e-mail addresses. As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. See id. § 552.137(b).⁴~~

In summary, the township must withhold the marked EMS record information under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, and the marked e-mail addresses under section 552.137 of the Government Code. The remaining 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 384435

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.