



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2011

Ms. Lauren Kalisek
Lloyd, Gosselink, Rochelle & Townsend, P.C.
For the Bosque River Coalition
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2011-02897

Dear Ms. Kalisek:

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# 410261.

The City of Waco (the "city"), which you represent, received two requests for information pertaining to the Bosque River Coalition (the "BRC"). The first requestor seeks thirty categories of information pertaining to the BRC, the North Bosque River Watershed (the "watershed"), specified dairies, the city's wastewater plant, and Lake Waco watershed. The second requestor seeks the BRC member list. We understand the city has provided or will provide some responsive information for the first requestor's inspection. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered the exceptions you claim and reviewed the

¹Although you claim some of the submitted information is excepted under section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, 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). However, we will address your attorney-client privilege claim under rule 503 for any information subject to section 552.022 of the Government Code.

submitted representative samples of information.² We have also received and considered comments submitted by the first requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note the city did not submit for our review information responsive to the portion of the first request seeking information pertaining to city funds provided to, transferred to, or used for the BRC. Although you state the city submitted a representative sample of information, no portion of the submitted representative sample pertains to city funds. Thus, we find the submitted information is not representative of the information sought in this part of the first request. Please be advised this open records letter applies to only the types of information you have submitted for our review. Therefore, this opinion 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. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). Because you have not submitted this information for our review, we assume you have released it. *See id.* §§ 552.301, .302. If you have not released this information, you must do so at this time. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the city did not fully comply with section 552.301 of the Government Code with respect to the first request. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). While the city raised sections 552.101, 552.103, 552.107, and 552.111 within the ten-business-day time period as required by subsection 552.301(b), the city did not raise sections 552.136 and 552.137 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov't Code § 552.352; Open Records Decision No. 574 at n.4 (2001) (mandatory exceptions). Because sections 552.136 and 552.137 are mandatory exceptions, we will consider the city's arguments under these exceptions notwithstanding its violation of section 552.301(b) in raising those sections.

We next note some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for the

²We 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.

disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a government body[.]” Gov’t Code § 552.022(a)(1). Section 552.022(a)(16) of the Government Code provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is expressly confidential under “other law.” *Id.* § 552.022(a)(16). Exhibits QQ, RR, and TT constitute completed reports made for the city. As you acknowledge, Exhibits II through MM constitute attorney fee bills. Although you assert portions of Exhibits II through MM and Exhibits QQ, RR, and TT are excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute “other law” for purposes of section 552.022. *See id.* § 552.007; *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. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the city may not withhold any portion of Exhibits II through MM, or Exhibits QQ, RR, and TT under section 552.103. You also assert the attorney fee bills in Exhibits II through MM contain information that is privileged under the attorney-client privilege 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim for portions of Exhibits II through MM. As you raise no other exceptions against disclosure of Exhibits QQ, RR, and TT, they must be released.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform us "[i]n an effort to protect water quality in the [watershed] and Lake Waco, the [c]ity responded to inquiries from watershed residents and landowners and assisted with the creation and operation of the BRC, a private organization with the goals of protecting water quality and conserving water resources of the Bosque River and its tributaries." You state the city assists in funding of the BRC and two city employees sit on the BRC's board of directors. You further state the city is a member of the BRC. We understand the city and the BRC share a common legal interest in this instance. You state the attorney fee bills submitted as Exhibits II through MM document communications between attorneys for the city and the BRC, the BRC, the city, and consultants. You also state the communications were made in connection with the rendition of professional legal services to the city, as a member of the BRC, and the BRC. You further state the communications were intended to be and have remained confidential. We note you have failed to identify some of the parties to the communications in the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Gov't Code § 552.301(e)(1(A)); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Upon review, we conclude the city may withhold the information we have marked in Exhibits II through MM on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We find you have failed to demonstrate the remaining information documents confidential communications that were made between privileged parties. Therefore, we conclude Texas Rule of Evidence 503 is not applicable to the remaining information in Exhibits II through MM, and it may not be withheld on this basis.

We now turn to your argument under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in 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). The 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 of the receipt of the request for information, and (2) the information at issue is related to the pending or anticipated 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). The 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). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. See Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). You inform us a dairy business filed an

application for an amendment of a permit with the Texas Commission on Environmental Quality (the "TCEQ"). You explain the BRC filed comments against the amendment. You further state the city, as a member of the BRC, anticipates the BRC will contest the permit amendment before the State Office of Administrative Hearings. We note the city would not, itself, be a party to this litigation and, therefore, does not have a litigation interest in the matters for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You assert the BRC objects to the release of the remaining information as it pertains to issues which will be disputed by the dairy farm in the contested case hearing. Based on your representations and our review, we determine the BRC reasonably anticipated litigation on the date this request was received. Furthermore, you explain the remaining information relates to the BRC's standing in the anticipated litigation and to information collected by the BRC, which the BRC expects to present in the contested case hearing. Upon review, we agree the remaining information relates to the anticipated litigation. We therefore conclude section 552.103 is applicable to the remaining information.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

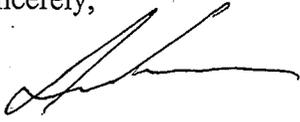
In summary, the city must release Exhibits QQ, RR, and TT pursuant to section 552.022(a)(1) of the Government Code. The city may withhold the information we marked in Exhibits II through MM under Texas Rule of Evidence 503 and release the remaining portions of Exhibits II through MM pursuant to section 552.022(a)(16). The city may withhold the remaining information under section 552.103 of the Government Code on behalf of the BRC.

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,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', with a long horizontal flourish extending to the right.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 410261

Enc. Submitted documents

c: Requestor
(w/o enclosures)