



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2013

Ms. Elizabeth Hanshaw Winn
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2013-03724

Dear Ms. Hanshaw Winn:

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# 480515.

The Travis County Attorney's Office and the Travis County District Attorney's Office (collectively, the "county attorney's office") received a request for any e-mail messages mentioning the requestor or his ex-wife from the accounts of nine specified individuals written in the thirty months preceding the request.¹ You state you have released some information to the requestor. You state you do not have information responsive to a portion of the request.² You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, and 552.152 of the

¹You state the county attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code and privileged under rule 503 of the Texas Rules of Evidence.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, we note the request specifically asks for e-mail messages naming the requestor or his ex-wife. The requestor also clarifies he is not requesting the messages in which he was either the sender or recipient. Furthermore, we note some of the submitted information was created after the request was received. Therefore, the documents which are not e-mail messages naming the requestor or his ex-wife, are e-mails which are either directly to or from the requestor, and are messages that were created after the request, which we have marked, are not responsive to the instant request for information. This ruling does not address the public availability of nonresponsive information, and the county attorney's office is not required to release nonresponsive information in response to this request.⁵

A portion of the information at issue includes a document subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(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 unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The information at issue contains a court-filed document that is subject to section 552.022(a)(17). Although you seek to withhold this information under section 552.107 of the Government Code, this section is a discretionary exception to

³Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Also, although you raise Texas Rule of Evidence 192.5, we note section 552.111 of the Government Code is the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code. Furthermore, we note the county attorney's office did not timely raise section 552.152 of the Government Code. *See* Gov't Code §§ 552.301(b), .302. However, as section 552.152 of the Government Code is a mandatory exception, we address your arguments. *See id.* 552.302.

⁴We 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.

⁵Accordingly, our office will not address your arguments under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.

disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the county attorney's office may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. We will also consider your argument under section 552.107 for the information not subject to section 552.022 of the Government Code.

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 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).

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. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body

must: (1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is 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 state the information at issue constitutes a communication made between privileged parties, the county attorneys and their client. You state this communication was made to facilitate the rendition of professional legal services to the client, who is the protective order applicant. You state that in Travis County, the county attorney files an application for a protective order on behalf of an applicant. *See* Fam. Code § 81.007(a) (county attorney or criminal district attorney is prosecuting attorney responsible for filing protective order applications); *see also* Attorney General Opinion JC-0439 at 7 (2001) (section 81.007 of Family Code makes county or district attorney's office responsible to file for county residents applications for protective orders in situations involving family violence). You inform us the county attorney forms an attorney-client relationship with a protective order applicant, and the information communicated is held in confidence and not intended to be disclosed to third parties. *See* TEX. R. EVID. 503(a)(1) ("client" includes person who is rendered professional legal services by lawyer, or who consults lawyer with view to obtaining professional legal services from that lawyer); *see also* Fam. Code § 81.0075 (prosecuting attorney who *represents* party in protective order proceeding may represent Department of Family and Protective Services in subsequent action involving party); *id.* § 81.002 (applicant for protective order or attorney *representing* applicant may not be assessed fee, cost, charge, or expense in connection with filing, serving, or entering of protective order). You further state that this communication has remained confidential. Based on your representations and our review, we find the county attorney's office may withhold the document we have marked under Texas Rule of Evidence 503.

Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503 above. 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. *See* ORD 676 at 6-7. 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 inform us a portion of the information at issue consists of communications between or among employees of the county attorney's office and the client, who is the protective order applicant. You state these communications were made to facilitate the rendition of

professional legal services to the protective order applicant. As mentioned above, you state that when a county attorney files a protective order application on behalf of the applicant, the county attorney forms an attorney-client relationship with a protective order applicant and the information communicated is held in confidence and not intended to be disclosed to third parties. *See* TEX. R. EVID. 503(a)(1); *see also* Fam. Code § 81.0075; *id.* § 81.002. Upon review, we find some of the e-mails at issue were sent to non-privileged parties. Accordingly, the county attorney's office may not withhold this information under section 552.107 of the Government Code. However, based on your representations and our review, we find the remaining information at issue, which we have marked, constitutes privileged attorney-client communications, which the county attorney's office may generally withhold under section 552.107(1) of the Government Code. We note however, some of the e-mail strings include e-mails that were sent to or received from non-privileged parties. Furthermore, if the e-mails sent to or received from the non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the present request for information. Therefore, to the extent the non-privileged e-mails, which we have marked, are maintained by the county attorney's office separate and apart from the otherwise privileged e-mail string in which they appear, they may not be withheld under section 552.107(1).

Section 552.103 of the Government Code 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). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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).

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* 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 litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and 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.

You state the information you have marked is the subject of a protective order case that the county attorney's office has been handling. You state that as a result of the alleged violations of the first, now-expired protective order, you anticipate using the information at issue in your prosecution of a new or second protective order. Based on your representations and our review, we conclude the county attorney's office reasonably anticipated litigation on the date it received the present request for information and the information at issue is related to that litigation. Thus, this information is generally subject to section 552.103 of the Government Code.

However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note the opposing party's attorney has seen or had access to portions of the information at issue. Therefore, this information is not protected by section 552.103 and may not be withheld on that basis. We also note 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). Accordingly, the county attorney's office may only withhold the information we have marked under section 552.103 of the Government Code. Further, we find you have failed to demonstrate how any of the remaining information relates to the anticipated litigation. Therefore, none of the remaining information may be withheld under section 552.103 of the Government Code.

Section 552.108 of the Government Code provides in part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2). We note the protections offered by subsections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Subsection 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while subsection 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudications. A governmental body claiming subsection 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims subsection 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* §§ 552.108(a)(2), .301(e)(1)(A).

You state the information you have marked under section 552.108(a)(1) should be withheld because it is the subject of an ongoing protective order case the county attorney's office has been handling. Based on your representation, we find release of the information you have marked under section 552.108(a)(1) would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court describes law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the information you have marked may be withheld under section 552.108(a)(1) of the Government Code.

However, you have provided conflicting representations regarding the information you seek to withhold under section 552.108(a)(2). You argue the information you have marked under section 552.108(a)(2) should be withheld because it relates to a criminal investigation that did not result in conviction or deferred adjudication. However, you indicate a portion of this information should also be withheld under section 552.108(a)(1). Based on your conflicting representations, we are unable to determine if the information you seek to withhold under section 552.108(a)(2) relates to an ongoing criminal case or a closed case that did not result in conviction or deferred adjudication. Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the information you have marked; therefore, no portion of this information may be withheld under section 552.108(a)(2) of the Government Code.

Section 552.111 excepts from disclosure “[a]n 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. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *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. TEX. R. CIV. P. 192.5; 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 that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

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.

You claim a portion of the information at issue consists of attorney work product that is protected under section 552.111. You state this information was prepared in relation to a protective order that expired and the investigation of a new protective order is based on a violation of the first protective order. You further contend information at issue contains the mental impressions and advice of the county attorneys who were preparing for and evaluating whether they should seek a new protective order for their client. Upon review, we find the county attorney's office has demonstrated the applicability of the attorney work product privilege to some of the information at issue. Thus, the county attorney's office may withhold the information we marked under section 552.111 of the Government Code. However, some of the information at issue consists of communications with the opposing party. Upon review, we find you have failed to demonstrate this information consists of material prepared or mental impressions developed in anticipation of litigation or for trial by the county attorney's office. Accordingly, the county attorney's office may not withhold any

of this information under the work product privilege of section 552.111 of the Government Code. Further, we find you have failed to demonstrate that any of the remaining information constitutes work product. Accordingly, the county attorney's office may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

Section 552.137 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).⁶ See Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the county attorney's office must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁷

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. Upon review, we find you have failed to demonstrate that release of any of the remaining information at issue would subject any employee or officer to a substantial threat of physical harm. Therefore, the county attorney's office may not withhold any of the remaining information at issue under section 552.152.

In summary, the county attorney's office may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The county attorney's office may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, then the county attorney's office may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The county attorney's office may withhold the information we have marked under section 552.103 of the Government Code. The county attorney's office may withhold the information you have marked under section 552.108(a)(1) of the Government Code. The

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

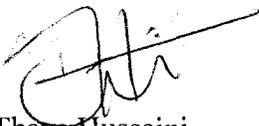
⁷Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

county attorney's office may withhold the information we have marked under section 552.111 of the Government Code. The county attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The remaining responsive information must be released.⁸

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 480515

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁸We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the county attorney's office receives another request for this information from a different requestor, the county attorney's must again seek a ruling from this office.