



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 24, 2016

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2016-11899

Dear Ms. Parker:

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# 611392.

The Texas Department of Transportation (the "department") received a request for specified e-mails, work orders, work requests, or e-mail attachments of four named department employees. You state you will release some information. You claim 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 representative sample of information.¹ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note the submitted information contains a CR-3 accident report. Section 552.101 of the Government Code excepts from disclosure "information considered

¹We 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 that those records contain substantially different types of information than that submitted to this office.

to be confidential by law, either constitutional, statutory, or by judicial decision.”² *Id.* § 552.101. Section 552.101 encompasses information subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. Transp. Code § 550.065(a)(1). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. *Id.* §§ 550.061 (operator’s accident report), .062 (officer’s accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). However, a governmental entity may release an accident report in accordance with subsections (c) and (c-1). *Id.* § 550.065(c), (c-1). Section 550.065(c) provides a governmental entity shall release an accident report to a person or entity listed under this subsection. *Id.* § 550.065(c).

In this instance, the requestor is not a person listed under section 550.065(c). Thus, the submitted accident report is confidential under section 550.065(b), and the department must withhold it under section 552.101 of the Government Code. However, section 550.065(c-1) requires the department to create a redacted accident report that may be requested by any person. *Id.* § 550.065(c-1). The redacted accident report may not include the information listed in subsection (f)(2). *Id.* Therefore, the requestor has a right of access to the redacted accident report. Although the department asserts sections 552.103 and 552.107 to withhold the information, a statutory right of access prevails over the Act’s general exceptions to public disclosure. *See, e.g.,* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Because sections 552.103 and 552.107 are general exceptions under the Act, the requestor’s statutory access under section 550.065(c-1) prevails and the department may not withhold the information under section 552.103 or section 552.107 of the Government Code. Thus, the department must release the redacted accident report to the requestor pursuant to section 550.065(c-1) of the Transportation Code.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

²The 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).

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

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

Gov't Code § 552.022(a)(1), (3), (17). The submitted information includes a completed report that is subject to subsection 552.022(a)(1). The department must release this information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also includes information in accounts that is subject to subsection 552.022(a)(3) and information that is also contained in a public court record that is subject to subsection 552.022(a)(17), which must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3), (17). The department seeks to withhold the information at issue under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary in nature and do not make information confidential under the Act. *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 Gov't Code § 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 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the information subject to section 552.022, which we have marked, under section 552.103 or 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. We will also address the department’s arguments against disclosure of the remaining information.

Texas Rule of Evidence 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 to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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).

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 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. *See id.* 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, orig. proceeding).

You assert the information subject to section 552.022 consists of privileged attorney-client communications. You inform us the information, which consists of e-mail attachments, was communicated between and among an attorney for the department and department employees in their capacities as clients. You state the information was communicated for the purpose of the rendition of legal services to the department. However, if these e-mail attachments are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mails to

which they are attached, then the department may not withhold the attachments under Texas Rule of Evidence 503. If the attachments subject to section 552.022 we have marked do not exist separate and apart from the e-mails to which they are attached, the department may withhold them under rule 503.

Next, we turn to the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. 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 state the remaining information consists of communications between and among an attorney for the department and department employees for the purpose of providing legal advice to and on behalf of the department. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the department may generally withhold the remaining information that is not subject to section 552.022 under section 552.107(1).³ We note, however, some of these e-mail strings attachments received from a non-privileged party. Furthermore, if the attachments received from the non-privileged party are removed from the e-mails and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mails to which they are attached, then the department may not withhold these non-privileged attachments under section 552.107(1).

Section 552.103 of the Government Code provides 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.

...

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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, orig. proceeding); *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 state, and provide documentation showing, a lawsuit styled *Allen v. Texas Department of Transportation*, Cause No. DC-15-00713, was pending against the department in the 68th Judicial District Court of Dallas County, Texas, when it received the instant request for information. You state the remaining information is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the department received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Accordingly, we find section 552.103 of the Government Code is generally applicable to the information at issue.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). We note the opposing party has seen or had access to the remaining information. Therefore, the department may not withhold this information under section 552.103(a).

In summary, the department must withhold the submitted accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code; however, the department must release the redacted accident report to the requestor pursuant to section 550.065(c-1) of the Transportation Code. The department may generally withhold the attachments we have marked that are subject to section 552.022 of the Government Code under Texas Rule of Evidence 503; however, if these attachments are maintained by the department separate and apart from the otherwise privileged e-mails to which they are attached, the department must release the marked attachments. The department may generally withhold the remaining information under section 552.107(1) of

the Government Code; however, if the attachments we have marked are maintained by the department separate and apart from the otherwise privileged e-mails to which they are attached, the department must release the marked attachments. The department must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/dls

Ref: ID# 611392

Enc. Submitted documents

c: Requestor
(w/o enclosures)