



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 15, 2016

Mr. George W. Vie III
Counsel for the Galveston County Consolidated Drainage District
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2228 Mechanic Street, Suite 400
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OR2016-16057

Dear Mr. Vie:

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# 618571.

The Galveston County Consolidated Drainage District (the "district"), which you represent, received a request for information pertaining to a specified parcel of land. You state you have provided some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the request for information because it was created after the date the district received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release this information in response to this request.

Next, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.103, 552.107, and 552.111 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). While you raised sections 552.103 and 552.107 of the Government Code within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.111 of the Government Code 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 generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, in failing to timely raise section 552.111 of the Government Code, the district has waived its argument under this section and may not withhold any of the submitted information on that basis. However, we will consider your timely-raised arguments for the submitted information.

Next, we note some of the responsive 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:

...

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

Gov't Code § 552.022(a)(3). The responsive information contains information relating to the receipt or expenditure of funds by the district that is subject to section 552.022(a)(3) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *See id.* The district seeks to withhold the information subject to section 552.022(a)(3) under section 552.107 of the Government Code. However section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* ORDs 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions). Therefore, the district may not withhold the information at issue 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. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider

the district's assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022, which we have marked. We will also consider the district's argument under section 552.107 against disclosure of the information not subject to section 552.022.

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 attorneys for the district, district employees, and outside consultants for the district. You state the information was communicated for the purpose of the rendition of legal services to the district. Based on these representations and our review, we find the district has established the attorney-client privilege is applicable to the information subject to section 552.022 which we have marked in Appendix Tab 2. Accordingly, the district may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, we note some of the information at issue consists of attachments received from non-privileged parties. Furthermore, 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 district separate and apart from the otherwise privileged e-mails to which they are attached, then the district 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 district 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 attorneys for the district, district employees, and outside consultants for the district for the purpose of providing legal advice to and on behalf of the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the district may generally withhold the information in Appendix Tab 1 and the remaining information that is not subject to section 552.022 in Appendix Tab 2 under section 552.107(1). We note, however, some of these e-mail strings in Appendix Tab 1 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 otherwise privileged e-mails and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are

maintained by the district separate and apart from the otherwise privileged e-mails to which they are attached, then the district 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.

...

(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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982). Further, the fact

that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You argue the information in Appendix Tab 3 should be withheld under section 552.103 of the Government Code. You state the district reasonably anticipates litigation because the district received an attorney representation letter from the requestor. However, upon review, we find you have failed to demonstrate any party had taken concrete steps toward filing litigation against the district when it received this request for information. Therefore, the district may not withhold the information in Appendix Tab 3 under section 552.103(a) of the Government Code.

The remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code.² Section 552.137 of the Government Code 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). Accordingly, the district must withhold the e-mail addresses in the remaining responsive information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or they are subject to subsection (c).

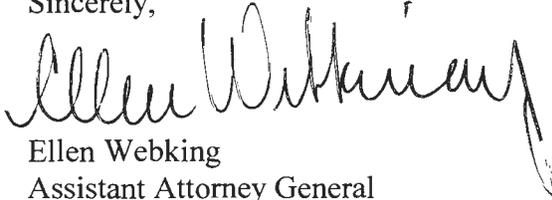
In summary, the district may generally withhold the attachments we have marked in Appendix Tab 2 that are subject to section 552.022 of the Government Code under Texas Rule of Evidence 503; however, if these attachments are maintained by the district separate and apart from the otherwise privileged e-mails to which they are attached, the district must release the marked attachments. The district may generally withhold the information in Appendix Tab 1 and the remaining information in Appendix Tab 2 under section 552.107(1) of the Government Code; however, if the e-mails we have marked are maintained by the district separate and apart from the otherwise privileged e-mails to which they are attached, the district must release the marked e-mails. The district must withhold the e-mail addresses in the remaining responsive information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or they are subject to subsection (c). The district must release the remaining responsive 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.

²The 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).

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,

A handwritten signature in black ink, appearing to read "Ellen Webking". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 618571

Enc. Submitted documents

c: Requestor
(w/o enclosures)