



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 19, 2016

Mr. William S. Helfand
Counsel for Sabine River Authority of Texas
Chamberlain, Hrdlicka, White, Williams & Aughtry, P.P.C.
1200 Smith Street, Suite 1400
Houston, Texas 77002

OR2016-16288

Dear Mr. Helfand:

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# 619709.

The Sabine River Authority of Texas (the "authority"), which you represent, received a request for information, including twenty-three categories of information, pertaining to a specified reservoir for a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the authority has not submitted information responsive to some of the requested categories. Further, the authority does not inform us it has released this information. Although the authority states it has submitted a representative sample of the requested information, we find the submitted information is not representative of all the types

¹We note, although the authority also raises section 552.022 of the Government Code, section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022. Although the authority also raises sections 552.106 and 552.111 of the Government Code for the submitted information, the authority provides no arguments explaining how these exceptions are applicable to the information at issue. Therefore, we assume the authority no longer asserts these exceptions. *See id.* §§ 552.301, .302. We note the authority did not timely raise sections 552.117 and 552.137; however, these sections are mandatory exceptions that constitute compelling reasons to withhold information sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .301, .302, .352. Accordingly, we will consider the authority's arguments under sections 552.117 and 552.137. We will also consider the authority's timely raised arguments under sections 552.101, 552.103, and 552.107 of the Government Code.

of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information the authority submitted for our review. This ruling does not authorize the authority to withhold any information that is substantially different from the types of information the authority submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). Accordingly, to the extent any information responsive to the remaining categories of the requested information existed on the date the authority received the request, we assume the authority has released it. If the authority has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note Exhibit D 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:

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

Gov't Code § 552.022(a)(1). Exhibit D consists of a completed report subject to subsection 552.022(a)(1). The authority must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* The authority asserts this information is excepted from release under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions to disclosure 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); 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), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, Exhibit D may not be withheld under section 552.103 or section 552.107. 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). Thus, we will consider the authority's assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the completed report. We will also consider the authority's argument under section 552.103 for the information that is not subject to subsection 552.022(a)(1).

Section 552.103 of the Government Code provides, in relevant 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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The authority states, and provides documentation showing, prior to the authority's receipt of the instant request, a lawsuit styled *Bonin v. Sabine River Authority of Texas and Sabine River Authority of Louisiana*, Cause No. B160137-C, was filed and is currently pending against the authority in the 163rd Judicial District Court of Orange County, Texas. Therefore, we agree litigation was pending on the date the authority received the present request for information. The authority asserts, and we agree, the information at issue relates to the litigation at issue because it pertains to the substance of the pending lawsuit. Therefore, we conclude the authority may withhold the information not subject to subsection 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.²

Generally, 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

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Texas Rule of Evidence 503(b)(1) provides:

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).

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, orig. proceeding).

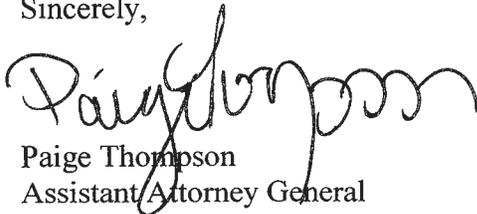
The authority states Exhibit D was communicated between privileged parties, including outside legal counsel and the Toledo Bend Project Joint Operation, which is comprised of the authority and the Sabine River Authority, State of Louisiana. The authority asserts the communication was made for the purpose of facilitating the rendition of professional legal services to the authority. The authority further asserts this communication was intended to be confidential and has remained confidential. Based on the authority's representations and our review, we find the authority has demonstrated the applicability of the attorney-client privilege to Exhibit D. Accordingly, the authority may withhold Exhibit D under rule 503 of the Texas Rules of Evidence.

In summary, the authority may withhold the information not subject to subsection 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The authority may withhold Exhibit D under rule 503 of the Texas Rules of Evidence.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 619709

Enc. Submitted documents

c: Requestor
(w/o enclosures)