



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 13, 2016

Ms. Kyla Durkin  
Legal Specialist  
Office of the General Counsel  
Lone Star College  
5000 Research Forest Drive  
The Woodlands, Texas 77381-4356

OR2016-20652

Dear Ms. Durkin:

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# 626031 (Lone Star College File No. LMC0001057).

Lone Star College (the "college") received a request for certain e-mail communications during a specified period and a specified engagement letter. You claim the requested information is excepted from disclosure under sections 552.102, 552.103, 552.107, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we must address an assertion by the requestor's attorney that the college did not comply with section 552.301 of the Government Code. Pursuant to subsection 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 for information. *See id.*

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<sup>1</sup>We 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 those submitted to this office.

§ 552.301(b). Further, pursuant to subsection 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The requestor's attorney states the requestor sent an e-mail to the college's general counsel on June 14, 2016, requesting the information at issue and asserts the college did not timely submit to this office the information required by subsections 552.301(b) and (e) in response to that e-mail. The Act requires a request for public information sent by e-mail to be submitted to the governmental body's officer for public information or that person's designee. *Id.* § 552.301(c). Upon review, we determine the e-mail sent to the college's general counsel on June 14, 2016, was not sent to the college's officer for public information or the officer's designee for purposes of subsection 552.301(c). *Id.* § 552.201(a) (chief administrative officer of governmental body is officer for public information). Thus, we find the e-mail correspondence of June 14, 2016, was not a valid request for purposes of the Act, and the college did not violate the procedural requirements of section 552.301 of the Government Code by not submitting the information required by subsections 552.301(b) and (e) within ten and fifteen business days of the receipt of the June 14, 2016, e-mail. We note the requestor properly submitted an e-mail request for the information at issue to the college's designee on June 21, 2016, and the college timely complied with section 552.301 with respect to this request. Accordingly, we will address the college's arguments against disclosure of the requested information.

Some of the requested information consists of an engagement letter related to the expenditure of public funds. Section 552.022(a)(3) of the Government Code provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless it is made confidential under the Act or other law. *Id.* § 552.022(a)(3). The college raises sections 552.103 and 552.107 of the Government Code for this information. However, sections 552.103 and 552.107 do not make information confidential. *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); *see also* Open Records Decision No. 676 at 10–11 (2002) (attorney-client privilege may be waived). Accordingly, the college may not withhold the engagement letter under either section 552.103 or section 552.107 of the Government Code. Nonetheless, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will consider your assertion of the attorney-client privilege for the engagement letter under rule 503 of the Texas Rules of Evidence.

Rule 503(b)(1) of the Texas Rules of Evidence 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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

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. *See* Open Records Decision No. 676 (2002). 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 communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The submitted engagement letter was sent between an attorney for the college and a third party hired to perform services for the college's attorney on behalf of the college. The letter indicates the third party was hired to perform these services in order for the attorney to provide legal services to the college and that the letter was intended to remain confidential.

Accordingly, we conclude the engagement letter is protected by the attorney-client privilege, and the college may withhold it under rule 503 of the Texas Rules of Evidence.

We now consider your arguments for the remaining requested information. Section 552.103 of the Government Code provides:

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

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 litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include the opposing party's hiring an attorney who makes a demand for disputed payments and threatens to sue if the payments are not made promptly, see Open Records Decision No. 346 (1982).

You state the college reasonably anticipates litigation because it terminated the requestor's employment contract and the requestor subsequently hired an attorney who made a demand for payment of breach of contract damages. This demand for the payment of damages was made prior to the college's receipt of the request for information. You also state the

remaining requested information relates to this anticipated litigation because it could be used in the litigation to establish the plaintiff's claims. Based on these representations and our review, we find the college reasonably anticipated litigation on the date it received the request for information and the information at issue relates to that anticipated litigation. Accordingly, we conclude the college may withhold the remaining requested information under section 552.103 of the Government Code.<sup>2</sup>

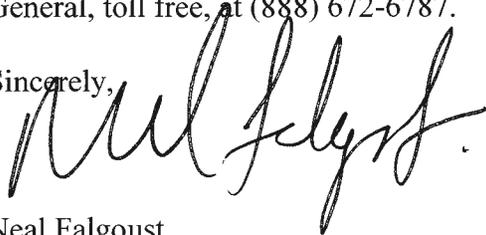
Once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the anticipated 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the college may withhold the engagement letter under rule 503 of the Texas Rules of Evidence. The college may withhold the remaining requested information under section 552.103 of the Government Code.

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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/som

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<sup>2</sup>As our ruling is dispositive, we do not address your remaining claimed exceptions.

Ref: ID# 626031

c: Requestor

Third Party