



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 22, 2016

Ms. Jessica Marsh  
General Counsel  
Texas Civil Commitment Office  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2016-28359

Dear Ms. Marsh:

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# 636985 (PIA 2016-0018).

The Texas Civil Commitment Office (the "TCCO") received a request for eight categories of information related to a specified incident involving a named individual and a specified entity. You state the TCCO does not possess information responsive to some of the request.<sup>1</sup> We note you have redacted information pursuant to section 552.147 of the Government Code.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.130, 552.134, 552.136, and 552.137 of the Government Code, confidential pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232 of title 20 of the United States Code, and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2(1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. Gov't Code § 552.147(b).

Initially, we note the TCCO has marked some of the submitted information as non-responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the TCCO is not required to release such information in response to this request.

Next, we understand you to argue some of the remaining responsive information is protected by FERPA. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>3</sup> Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). We note FERPA applies only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See id.* § 99.33(a)(2). You do not explain the transcripts were transferred directly to the TCCO from an educational institution. Thus, the information at issue is not subject to FERPA and the TCCO may not withhold any portion of the information at issue on that basis.

Additionally, we note some of the remaining 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; [and]

...

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

Gov't Code § 552.022(a)(3), (17). The remaining responsive information contains information in a contract relating to the receipt or expenditure of funds by the TCCO that is subject to section 552.022(a)(3) and court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (17). You seek to withhold the

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

information subject to section 552.022(a)(3) and section 552.022(a)(17), which we have marked, under section 552.103 and the information subject to section 552.022(a)(17) under section 552.107. However, these sections are discretionary exceptions 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 section 552.103); 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 information at issue may not be withheld under these exceptions. As you raise no other exceptions against disclosure of the contracts, which we have marked, the TCCO must release them pursuant to section 552.022(a)(3) of the Government Code. Further, although you also assert the information subject to section 552.022(a)(17) is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy, we note information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Therefore, the TCCO may not withhold the information subject to section 552.022(a)(17) under section 552.101 in conjunction with common-law privacy. 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). Therefore, we will consider your arguments under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17) of the Government Code. Further, because section 552.101 of the Government Code can make information confidential for purposes of section 552.022, we will consider your remaining argument under section 552.101 for the information at issue. We will also consider your arguments against disclosure for the remaining responsive information not subject to section 552.022 of the Government Code.

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).

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).

You assert the information subject to section 552.022(a)(17) of the Government Code should be withheld under the attorney-client privilege of rule 503. You explain the information at issue consists of an attachment to a privileged e-mail between TCCO attorneys. You state the information was communicated for the purpose of the rendition of legal services to the TCCO. You state the communication at issue has not been, and was not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the e-mail communication at issue. However, we find the attachment at issue is separately responsive to the request and it exists separate and apart from the otherwise privileged communication to which it is attached. Further, we find you have not demonstrated this attachment at issue, standing alone, or any of the remaining information subject to section 552.022(a)(17), are privileged attorney-client communications. Therefore, we find the TCCO may not withhold the attachment at issue, or any of the information subject to section 552.022(a)(17), under rule 503 of the Texas Rules of Evidence.

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 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 from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” 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) (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 TCCO is responsible for providing necessary and appropriate supervision and treatment for civilly committed sexually violent predators. You state the individual at issue was a civilly committed sexually violent predator who was under the supervision of TCCO staff case managers and resided at a TCCO contracted halfway house. You inform us the halfway house was operated by Avalon Correctional Services (“Avalon”). You state the individual at issue escaped from the halfway house and sexually assaulted, kidnapped, and robbed the requestor’s client. You state, and submit documentation demonstrating, the requestor’s client has filed suit against Avalon and that “although TCCO has not yet been named as a party in [this] case, as the entity statutorily responsible for the supervision of [the named individual], [the] TCCO anticipates being named a defendant in the case[.]” Additionally, you state the TCCO has obtained representation from the Office of the Attorney General in regard to this case. Based on your representations, our review of the information at issue, and the totality of the circumstances, we find the TCCO has demonstrated it reasonably anticipated litigation when it received the request for information. We also find the TCCO has established the information at issue is related to the anticipated

litigation for purposes of section 552.103(a). Therefore, we agree the TCCO may withhold the remaining responsive information not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code.<sup>4</sup>

However, we note once the responsive information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You claim the information subject to section 552.022(a)(17) of the Government Code is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 810.92 of title 22 of the Texas Administrative Code, which consists of the code of professional ethics for licensees of the Council on Sex Offender Treatment (the “council”) promulgated by the council pursuant to section 110.058 of the Occupations Code. *See* Occ. Code § 110.058 (granting rulemaking authority to the council); *see also* 22 T.A.C. § 810.1(a)-(b) (provisions of chapter 810 govern procedures for the licensing of individuals who assess and treat adult sex offenders and juveniles who commit sexual offenses in the State of Texas and cover, in part, the standards of practice for licensees). Section 810.92(c) provides, in part:

(c) Confidentiality. Licensees shall:

- (1) . . . maintain and store records on each client to ensure safety and confidentiality in accordance with the highest professional and legal standards including but not limited to [the Health Insurance Portability and Accountability Act of 1996], the Texas Health and Safety Code, Chapter 611, and laws pertaining to victims rights (Federal Justice for All Act and Texas Code of Criminal Procedure, Chapter 56); licensees shall maintain the confidentiality of victims and shall not provide victim information to clients or others not specified in Occupations Code, Chapter 109 (§109.051 and §109.052)[.]

22 T.A.C. § 810.92(c)(1); *see also id.* § 810.2(a)(11) (defining “licensee” for purposes of chapter 810 of title 22 of the Texas Administrative Code as “[a] treatment provider licensed by the council and who is recognized based on training and experience to provide assessment and treatment to adult sex offenders and/or juveniles who commit sexual offenses who have been convicted, adjudicated, deferred, or referred by a State agency or court”).

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 810.92(c)(1) pertains to information held by licensees. We note the information at issue consists of court-filed documents subject to section 552.022(a)(17) of the Government Code which are held by the TCCO. Therefore, we find you have failed to demonstrate section 810.92 is applicable to the information at issue and none of it may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the biometric identifiers under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, in the information subject to section 552.022(a)(17), the TCCO must withhold the biometric identifiers we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which makes certain mental health record information confidential. Section 611.002 provides in pertinent part the following:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Upon review, we find none of the remaining responsive information consists of communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional. Accordingly, the TCCO may not withhold any of the remaining responsive information under section 552.101 of the Government Code on the basis of section 611.002 of the Health and Safety Code.

In summary, the TCCO must release the information we have marked pursuant to sections 552.022(a)(3) and 552.022(a)(17) of the Government Code. In releasing the information we have marked pursuant to section 552.022(a)(17), the TCCO must withhold the biometric identifiers we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The TCCO may withhold the

remaining responsive information not subject to section 552.022 of the Government Code under section 552.103(a) 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,



Kavid Singh  
Assistant Attorney General  
Open Records Division

KVS/bw

Ref: ID# 636985

Enc. Submitted documents

c: Requestor  
(w/o enclosures)