



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 25, 2017

Mr. Frank E. Pérez
Counsel for the Texas Southmost College District
Frank E. Pérez & Associates, P.C.
P.O. Box 3490
Brownsville, Texas 78523-3490

OR2017-08778

Dear M. Perez:

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# 654864.

The Texas Southmost College District (the "district"), which you represent, received a request for (1) all information pertaining to a request for proposals issued by the district; (2) all communications between Brown & Brown, Inc. ("Brown"), a named individual, and the district during a certain time period; and (3) all communications between a named company and the district during a certain time period. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ Additionally, you state release of this information may implicate Brown's proprietary interests. Accordingly, you state you notified Brown of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code* § 552.304

¹Although you do not raise section 552.107 of the Government Code in your brief, we understand you to raise this exception based on the substance of your arguments.

(interested third party may submit comments stating why information should or should not be released).

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Brown explaining why the submitted information should not be released. Therefore, we have no basis to conclude Brown has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the district may not withhold the submitted information on the basis of any proprietary interest Brown may have in it.

Next, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2017-03780 (2017). In Open Records Letter No. 2017-03780, we determined the district must release the information at issue. You now seek to withhold the information at issue under section 552.103 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. Section 552.103 does not prohibit the release of information or make information confidential. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not now withhold any of this information under section 552.103 of the Government Code. As no other exceptions to disclosure are raised for this information, which we have marked, the district must release it pursuant to section 552.007 of the Government Code.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code, which provides in pertinent 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 [of the Government Code]; [and]

...

(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)(1), (3). We note Exhibit U is part of a completed investigation subject to section 552.022(a)(1). The district must release this information unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *Id.* § 552.022(a)(1). Additionally, the information we have marked consists of information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body, and is subject to section 552.022(a)(3). The district must release this information unless it is confidential under the Act or other law. *Id.* § 552.022(a)(3). Although you assert section 552.103 of the Government Code for the information subject to sections 552.022(a)(1) and 552.022(a)(3), and sections 552.107 and 552.111 of the Government Code for the information subject to section 552.022(a)(1), these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5. Therefore, the district may not withhold the information subject to sections 552.022(a)(1) and 552.022(a)(3) under section 552.103, section 552.107, or section 552.111 of the Government Code.

However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address the assertion of the attorney-client privilege under Texas Rule of Evidence 503, and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022(a)(1). Further, we note some of the information subject to section 552.022 is subject to section 552.136 of the Government Code, which

makes information confidential under the Act.² Thus, we will address the applicability of section 552.136 for this information. We will also consider your argument under section 552.103 for the remaining information not subject to section 552.022.

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 [s]ubsection (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).

You state the information at issue is the subject of pending litigation. You inform us, and provide documentation showing, prior to the receipt of the instant request a lawsuit was filed against the district styled *English Insurance Agency v. Texas Southmost College*, Cause No. 2016-DCL-07200, on October 28, 2016, in the 138th Judicial District Court of Cameron County, Texas. Based upon your representation and our review, we find litigation was pending at the time the district received the present request. Further, we agree the information at issue relates to the pending litigation for the purposes of section 552.103. Therefore, the district may withhold the remaining information not subject to

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).

section 552.022 of the Government Code under section 552.103(a) of the Government Code.

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.

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). *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 [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert Exhibit U consists of a privileged attorney-client communication between district officials and outside counsel for the district made for the purpose of the rendition of legal services to the district. You state the information 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 the district has established Exhibit U constitutes an attorney-client communication under rule 503. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold Exhibit U pursuant to rule 503 of the Texas Rules of Evidence.³

Section 552.136 of the Government Code states, in part, “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See Open Records Decision No. 684* (2009). Accordingly, the district must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code.

In summary, except for the information we have marked under section 552.007 of the Government Code, which the district must release, the district may withhold the information not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code. The district may withhold Exhibit U pursuant to rule 503 of the Texas Rules of Evidence. The district must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code. The district must release the information we have marked under section 552.007 of the Government Code, as well as the remaining information.

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

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive, flowing style.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 654864

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)