



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 28, 2017

Mr. Leonard J. Schwartz
General Counsel
Texas School for the Blind and Visually Impaired
1100 West 45th Street
Austin, Texas 78756

OR2017-14502

Dear Mr. Schwartz:

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# 663879.

The Texas School for the Blind and Visually Impaired (the "school") received a request for information pertaining to a specified incident. You state you do not have information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the portion of the request seeking information pertaining to employees on duty on the day of the specified incident. Although the school states it has submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This

¹The 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 dismissed); 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).

ruling does not authorize the school to withhold any information that is substantially different from the types of information you 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 additional responsive information existed on the date the school received the request, we assume the school has released it. If the school 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 some of the submitted 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 submitted information includes an invoice and an executed contract relating to the receipt or expenditure of funds by the school that is subject to section 552.022(a)(3). This information, which we marked, must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(3) in Exhibit 10 under sections 552.103 and 552.107, and the information in Exhibit 16 under section 552.103. However, these sections are discretionary in nature 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); *see also* 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 subject to section 552.022(a)(3) may not be withheld under these sections. As you raise no other exceptions against disclosure of the contract in Exhibit 16, the school must release this information pursuant to section 552.022(a)(3) 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 your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. We will also consider your arguments against disclosure for the remaining 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).

We note the information subject to section 552.022(a)(3) in Exhibit 10 consists of an attachment to an e-mail communication you state is between outside counsel for the school and school employees made in furtherance of the rendition of professional legal services to the school. You state the e-mail communication was intended to be confidential and was not disclosed to non-privileged parties. Upon review, we find you have demonstrated the

attachment is part of a privileged e-mail communication for purposes of rule 503 of the Texas Rules of Evidence. However, we note the attachment reflects it was shared with a party you have failed to demonstrate is privileged. Furthermore, if the attachment is removed from the privileged e-mail communication and stands alone, it is responsive to the request for information. Therefore, if the attachment, which we marked, is maintained by the school separate and apart from the otherwise privileged e-mail communication to which it is attached, then the school may not withhold the attachment under rule 503. However, if the attachment is not maintained separate and apart from the otherwise privileged e-mail communication, then the school may withhold this information under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those 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. *See* 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. *See Huie*, 922 S.W.2d at 923.

You state the information in Exhibit 6 consists of a communication between the school's counsel and school staff. You indicate the communication was made for the purpose of facilitating the rendition of professional legal services to the school and that the communication has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the school may generally withhold the information we marked under section 552.107(1) of the Government Code. However, we note the privileged e-mail string includes an e-mail sent from a non-privileged party. Furthermore, this e-mail, standing alone, is responsive to the request for information. Therefore, if this non-privileged e-mail, which we marked, is maintained by the school separate and apart from the otherwise privileged e-mail string in which it appears, then the school may not withhold it under section 552.107(1) of the Government Code. In that case, we will address your remaining arguments against disclosure for this information and the remaining information.

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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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. *See 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). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it received a notice of claim letter, and the governmental body represents the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state, and submit documentation showing, prior to the school's receipt of the instant request, the school received a notice of claim letter from the requestor on behalf of his client who was injured in the incident at issue. You inform us the claim letter complies with the TTCA. You state the information at issue is directly related to the anticipated litigation. Based on your representations and our review, we find the school reasonably anticipated litigation at the time the school received the request for information and the information at issue is related to the anticipated litigation. Accordingly, with the exception of the information subject to section 552.022, the school may generally withhold the remaining information under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the anticipated 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 that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the anticipated litigation has seen or had access to some of the information at issue, which we marked for release. Therefore, the school may not withhold this information under

section 552.103(a). Accordingly, with the exception of the information we marked for release, the school may withhold the remaining information at issue under section 552.103(a) of the Government Code.² We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

In summary, the school must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. The school may generally withhold the attachment, which we marked, under Texas Rule of Evidence 503; however, if the attachment, which we marked, is maintained by the school separate and apart from the otherwise privileged e-mail communication to which it is attached, then the school may not withhold the attachment under rule 503 of the Texas Rules of Evidence. The school may withhold the information we marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail, which we marked, is maintained by the school separate and apart from the otherwise privileged e-mail string in which it appears, then the school may not withhold it under section 552.107(1) of the Government Code. With the exception of the information we marked for release, the school may withhold the remaining information at issue 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, 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,



D. Michelle Case
Attorney
Open Records Division

DMC/sdk

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

Ref: ID# 663879

Enc. Submitted documents

c: Requestor
(w/o enclosures)