



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 29, 2017

Ms. Carah-Beth Bass  
Counsel for Colorado County  
Allison, Bass & Magee, L.L.P.  
402 West 12th Street  
Austin, Texas 78701

OR2017-19734

Dear Ms. Bass:

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# 673373.

Colorado County (the "county"), which you represent, received a request for (1) all e-mails exchanged between a named individual and four other named individuals during a specified time period, (2) all documents pertaining to a specified conflict of interest, and (3) all documents pertaining to three named individuals. The county received a second request from the same requestor for all e-mails exchanged between a named individual and two other named individuals during a specified time period. You state the county has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, 552.108, 552.111, 552.130, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the information submitted in response to the second request are not responsive because they are not e-mails exchanged between the first named individual and either of the remaining named individuals. This ruling does not address the public availability of the non-responsive information and the county need not release it in response to the request.

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<sup>1</sup>Although you generally raise section 552.101 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

We now address your argument some of the responsive information is not subject to the provisions of the Act because it consists of records of the judiciary. The Act generally requires the public disclosure of information maintained by a “governmental body.” See Gov’t Code § 552.002(a)(1). While the Act’s definition of a “governmental body” is broad, it specifically excludes the judiciary. See *id.* § 552.003(1)(B). Information “collected, assembled, or maintained by or for the judiciary” is not subject to the Act but instead is “governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.” *Id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under Gov’t Code § 552.003(1)(B) prior to enactment of Gov’t Code § 552.0035). In determining whether a governmental entity falls within the judiciary exception of the Act, this office looks to whether governmental entity maintains the relevant records as an agent of the judiciary in regard to judicial, as opposed to administrative functions. See Open Records Decision No. 646 at 2-3 (1996) (citing *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ)). We note the requestor seeks e-mails received by the county’s district attorney from the named judges. Thus the responsive information at issue is maintained by the county in the transaction of official county business. See Gov’t Code § 552.002. Because this information is maintained by the county in connection with the transaction of its official business, it does not constitute records of the judiciary. Therefore, the responsive information at issue is subject to the Act and may only be withheld if it is excepted from disclosure under an exception in the Act.

We note the responsive information contains notices, agendas, and minutes of public meetings of the county. Notices, agendas, and minutes of a governmental body’s public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. See Gov’t Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body’s chief administrative officer or officer’s designee), .043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information other statutes make public. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the submitted notices, agendas, and minutes of public meetings must be released pursuant to section 551.022 of the Government Code.

We also note the remaining responsive information includes orders approved by the Colorado County Commissioners Court (the “commissioners court”). These orders appear to have been adopted at a public meeting of the commissioners court and, thus, each order is an official record of a governmental body’s public proceedings. As such, the submitted orders, and their attachments, must be released. See Open Records Decision No. 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”).

Further, we note the remaining responsive information includes court-filed documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of “information that is also contained in a public court record[.]” unless the information is

expressly made confidential under the Act or other law. Gov't Code § 552.022(a)(17). You seek to withhold the court-filed documents under sections 552.103, 552.106, 552.107, 552.108, and 552.111 of the Government Code. However, sections 552.103, 552.106, 552.107, 552.108, and 552.111 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 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), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the county may not withhold the information subject to section 552.022(a)(17), which we have marked, under sections 552.103, 552.106, 552.107, 552.108, and 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). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17). We will also consider your arguments against disclosure of the information not subject to section 552.022(a)(17).

Rule 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 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).

Accordingly, 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* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under 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 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 claim the information subject to section 552.022(a)(17) consists of attachments to communications between county officials and attorneys for the county and their representatives. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the county. We understand these communications were intended to be confidential and the confidentiality of these communications has been maintained. However, we note the information subject to section 552.022(a)(17) has been seen by non-privileged parties, and this information is separately responsive to the requests. Accordingly, to the extent the information subject to section 552.022(a)(17), which we have marked, exists separate and apart from the privileged e-mail communications to which it is attached, the county may not withhold it under rule 503 of the Texas Rules of Evidence. If the information subject to section 552.022(a)(17) does not exist separate and apart from the privileged communications, the county may withhold it under rule 503 of the Texas Rules of Evidence.

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). A governmental body 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).*

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.* This office has found a pending complaint with the Equal Opportunity Employment Commission (“EEOC”) indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You state, and provide documentation showing, prior to the county's receipt of the instant request, a lawsuit styled *Matthews v. Colorado County*, No. 16-0710, was filed and is currently pending in the Supreme Court of Texas. Therefore, we agree litigation was pending on the date the county received the present request for information. You further state, prior to the county's receipt of the instant request, a former employee filed a claim against the county with the EEOC. Accordingly, we also find the county reasonably anticipated litigation on the date this request was received. You explain the information not subject to section 552.022(a)(17) pertains to the substance of the lawsuit and discrimination claims. Based on your representations and our review, we find the information not subject to section 552.022(a)(17) is related to the pending and anticipated litigation. Accordingly, the county may withhold the information not subject to section 552.022(a)(17) under section 552.103 of the Government Code.<sup>2</sup>

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 that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

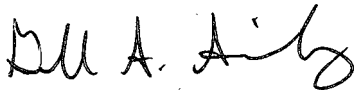
applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the county must release the submitted notices, agendas, and minutes of public meetings must be released pursuant to section 551.022 of the Government Code. The county must also release the submitted orders, and their attachments. The county may withhold the information subject to section 552.022(a)(17) of the Government Code we have marked pursuant to rule 503 of the Texas Rules of Evidence, if the marked information does not exist separate and apart from the otherwise privileged communications to which they are attached. The county may withhold the information not subject to section 552.022(a)(17) under section 552.103 of the Government Code. The county must release any remaining responsive 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](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,



Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/tdw

Ref: ID# 673373

Enc. Submitted documents

c: Requestor  
(w/o enclosures)