



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 10, 2017

Ms. Carah-Beth Bass
Counsel for the Caldwell County District Attorney's Office
Allison, Bass & Magee, L.L.P.
402 West 12th Street
Austin, Texas 78701

OR2017-23110

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# 679315.

The Caldwell County District Attorney's Office (the "district attorney's office"), which you represent, received a request for e-mails sent or received by five named employees relating to specified topics during a specified time period.¹ You state the district attorney's office released some information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note the district attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Further, the district attorney's office states it sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. See Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. See *id.* § 552.263(a). You also inform us the district attorney's office received the required deposit on July 28, 2017. See *id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

²Although you also raise section 552.101 of the Government Code for the submitted information, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. See Gov't Code §§ 552.301, .302.

Initially, we note some of the submitted information is not responsive to the instant request because it does not pertain to the specified topics. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request.

Next, we note the submitted responsive information contains the minutes of public meetings and draft minutes of public meetings. Minutes and agendas 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). As a general rule, the exceptions to disclosure found in the Act, such as sections 552.103, 552.107, and 552.111 do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the minutes and draft minutes of the public meetings must be released pursuant to chapter 551 of the Government Code.

Next, we note some of the remaining responsive information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) 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[.]" Gov't Code § 552.022(a)(3). Some of the remaining responsive information consists of information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body subject to section 552.022(a)(3). The district attorney's office must release this information 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) under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 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. 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 district attorney's office may not withhold the information subject to section 552.022 under section 552.103 or section 552.107. 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 for the information subject to section 552.022. Additionally, we will consider your arguments for the information not subject to section 552.022.

Texas Rule of Evidence 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 at 6-7. 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 [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the information subject to section 552.022 consists of an attachment to a privileged attorney-client communication. You inform us the information at issue was communicated between and among attorneys for Caldwell County (the "county"), including the district attorney's office, and employees of the county for the purpose of the rendition of legal services to the county. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the district attorney's

office may withhold the information we marked under rule 503 of the Texas Rules of Evidence.

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 district attorney's office 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 was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 district must meet both prongs of this test for information to be excepted under section 552.103(a). We note contested cases conducted under the APA are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 (1991) (contested case under APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103). We further note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the APA. See *id.*

You assert the remaining responsive information pertains to pending litigation involving the county. You explain the information at issue pertains to a permit application pending with the Texas Commission on Environmental Quality ("TCEQ"). You state, and provide documentation showing, a hearing at SOAH was pending when the district attorney's office received the instant request and, thus, assert litigation was pending before SOAH and TCEQ. You provide documentation showing the county is a protestant to the application and filed comments against the permit prior to receiving the instant request; thus, we understand the county is a party to the proceeding at issue. Based on your representations and our review, we determine litigation was pending on the date the district attorney's office received the

request for information. Furthermore, we agree the information at issue relates to the pending litigation. Therefore, we conclude the district attorney's office may withhold the remaining responsive information under section 552.103 of the Government Code.³

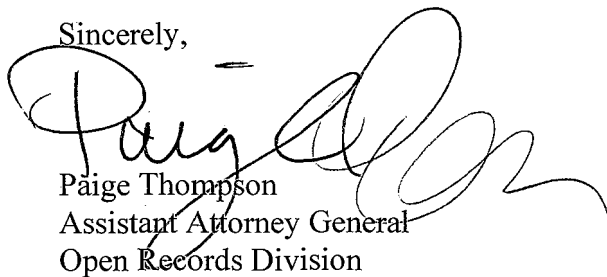
We note once the information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the minutes and draft minutes of the public meetings must be released pursuant to chapter 551 of the Government Code. The district attorney's office may withhold the information we marked under rule 503 of the Texas Rules of Evidence. The district attorney's office may withhold the remaining responsive 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, 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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/eb

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Ref: ID# 679315

Enc. Submitted documents

c: Requestor
(w/o enclosures)