



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 18, 2019

Mr. Robert Abernathy  
Chief Executive Officer  
Ector County Hospital District  
P.O. Box 7239  
Odessa, Texas 79760

OR2019-26163

Dear Mr. Abernathy:

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# 786361.

The Ector County Hospital District (the "district") received a request for expense reports submitted and approved by specified individuals and information related to the employment of those individuals.<sup>1</sup> You state some information has been released. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.116 of the Government Code, and privileged under Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information was the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2019-18888 (2019). In that ruling we concluded, in relevant part, the district may withhold a portion of

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<sup>1</sup> The district states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We also note the district sent the requestor a cost estimate pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate on June 27, 2019. *See* Gov't Code § 552.2615.

the submitted information under Texas Rule of Evidence 503. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the submitted information is identical to the information previously requested and ruled upon, the district may continue to rely on Open Records Letter No. 2019-18888 (2019) as a previous determination and withhold the identical information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address the applicability of the Act to its disclosure.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code, which 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information in Exhibit 9 includes a completed investigation subject to 552.022(a)(1). *Id.* The district must release the completed report or investigation pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* You raise sections 552.103, 552.107, and 552.116 of the Government Code for the information at issue. However, sections 552.103, 552.107, and 552.116 are discretionary exceptions and do not make information confidential under the Act. *See* 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). Accordingly, the district may not withhold any portion of the information subject to section 552.022(a)(1) on the basis of any of the exceptions you raise. 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 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(1) of the Government Code. Further, we will address the district's arguments against disclosure of the remaining information.

Rule 503(b)(1) of the Texas Rules of Evidence 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* Open Records Decision No. 676 (2002). 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 [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the information at issue consists of communications between district employees and the district's Chief Legal Counsel, who provides legal advice to both the staff and the district's board of directors. You also state the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the district. You assert the information at issue was intended to be confidential and confidentiality has been

maintained. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report 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). Therefore, the district may withhold the information subject to 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above 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 unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

The district claims some of the remaining information consists of communications between city attorneys, city employees, city-retained legal counsel, and other privileged parties that were made in furtherance of the rendition of professional legal services to the city. The district also states these communications were not intended for third parties, and the confidentiality of these communications have been maintained. Based upon these representations and our review, we find the information we marked in Exhibit 9 consists of privileged attorney-client communication. Accordingly, the district may withhold the information we marked in Exhibit 9 under section 552.107(1) of the Government Code. However, you have failed to demonstrate the remaining information at issue, which we marked for release, constitutes privileged attorney-client communications for the purposes of section 552.107(a). Accordingly, the district may not withhold the information we marked for release under section 552.107(1).

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 section 552.103(a) 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 [14th 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).

The question of 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 provide concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

The district argues the remaining information in Exhibit 9 is protected by section 552.103 of the Government Code. Upon review, we find the district has not demonstrated any party had taken concrete steps toward filing litigation to which the district would be a party when the department received the request for information. Therefore, we conclude the department has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the district may not withhold the remaining information in Exhibit 9 under section 552.103(a) of the Government Code.

Section 552.116 of the Government Code provides the following:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074,

Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert the remaining information in Exhibit 9 is subject to section 552.116. Upon review, however, we find you have failed to demonstrate the remaining information in Exhibit 9 consists of audit working papers prepared or maintained in relation to an audit authorized or required by any of the laws or authorities specified in section 552.116(b)(1). Thus, the district may not withhold any of the remaining information in Exhibit 9 under section 552.116 of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The supreme court considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Accordingly, the district must withhold the submitted employee's date of birth within the remaining information under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the

Government Code.<sup>2</sup> See Gov't Code §§ 552.117(a)(1), .024. Thus, the district may only withhold under section 552.117 the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. However, section 552.117 does not encompass a personal e-mail address. See Gov't Code § 552.117(a)(1).

Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. See Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024, the district must withhold their home address, social security number, personal telephone numbers and family member information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not timely request confidentiality under section 552.024, then the district may not withhold their information under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[,]" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Upon review, we find the e-mail address at issue is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the district must withhold the e-mail address in Exhibit 10 under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its public disclosure.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *Id.* § 552.147. Accordingly, the district may withhold the social security number of the living individual in Exhibit 10 under section 552.147 of the Government Code.

In summary, the district may withhold the information subject to 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. The district may withhold the information we marked in Exhibit 9 under section 552.107(1) of the Government Code. The district must withhold the submitted employee's date of birth within the remaining information under section 552.102(a) of the Government Code. To the extent the employee whose information is at issue timely requested confidentiality under section 552.024, the district must withhold the employee's home address, social security number, personal telephone numbers and family member information under section 552.117(a)(1)

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<sup>2</sup> The 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).

of the Government Code. The district must withhold the e-mail address in Exhibit 10 under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its public disclosure. The district may withhold the social security number of the living individual in Exhibit 10 under section 552.147 of the Government Code. The remaining information must be released.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Sean McCormick  
Assistant Attorney General  
Open Records Division

SMC/eb

Ref: ID# 786361

Enc. Submitted documents

c: Requestor  
(w/o enclosures)