

JESSICA OLIVAREZ

CAUSE NO. C2237586

PAUL ANDERSON	§	IN THE 145 TH JUDICIAL
	§	
V.	§	COURT OF
	§	
NACOGDOCHES COUNTY	§	NACOGDOCHES COUNTY, TEXAS

RESPONDENT'S PLEA IN ABATEMENT

Comes now Nacogdoches County, Respondent herein, in the above styled and numbered cause, and respectfully requests that this court abate this case pending a ruling from the Attorney General's Office regarding the status of the requested records. In support thereof, Respondent would show the following:

I. FACTS

On February 15, 2022, Paul Anderson, Petitioner herein, requested certain records from Nacogdoches County under the authority of the Texas Public Information Act (Tex. Gov't Code, Ch. 552). [Please see Exhibit A.] On March 1, 2022, Petitioner was notified via email that Nacogdoches County had sought an opinion from the Attorney General as to whether Petitioner's request falls under an exception to the Texas Public Information Act. (Please see Exhibit B.) On March 7, 2022, Nacogdoches County filed its brief in support of its argument. (Please see Exhibit C). As of the date of the filing of this Plea, no opinion has been received from the Attorney General. On April 8, 2022, Petitioner filed a Suit for Writ of Mandamus, asking this Court to order production of the same records that are subject to the pending ruling from the Attorney General's Office.

II. LAW

Section 552.301(a) of the PIA states:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there

has not been a previous determination about whether the information falls within one of the exceptions.

Section 552.301(b) of the PIA states:

The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

In this matter, Nacogdoches County asked for an opinion and had a duty to do so. As of the date of the filing of this plea, the Attorney General had not yet given its opinion. Once a decision is made by the Attorney General, Nacogdoches County intends to comply with it.

A requestor may file a suit for a writ of mandamus compelling the production of records requested from a governmental body if the governmental body either refuses to request an opinion from the Attorney General regarding the production of those records, or if the governmental body refuses to produce records that have been deemed to be public records by the Attorney General. (See §552.321(a)) In this case, Nacogdoches County, acting under the belief that the requested records are exempt from production, promptly requested an opinion from the Attorney General, and currently awaits a response.

While a requestor is not required to defer a suit for mandamus, a court may decide, exercising sound discretion, to abate proceedings to await the Attorney General's ruling. See *Kallinen v. City of Houston*, 462 S.W.3d 25 Tex.S.Ct (2015).

This suit should be abated until the attorney general renders an opinion. Once an opinion is rendered, this matter will be moot.

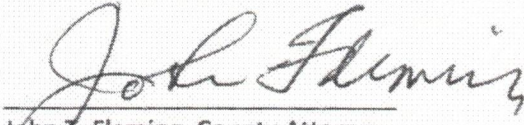
Respondent requests this matter be set for hearing.

PRAYER

Respondent, Nacogdoches County, prays that this Court abate this proceeding until a ruling has been made by the Attorney General's Office and the County has been given an opportunity to comply

with any adverse ruling, if one is made and for such other and further costs to which it may show itself entitled.

Respectfully submitted,

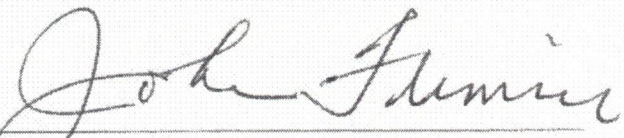
By: 
John T. Fleming, County Attorney
Texas Bar No. 00788981
Email: jfleming@co.nacogdoches.tx.us

Stephanie Stephens, Asst. County Attorney
Texas Bar No. 19160055
Email: sstephens@co.nacogdoches.tx.us

101 W Main
Suite 230
Nacogdoches, TX 75961
Tel. (936) 560-7788
Fax. (936) 560-7809
Attorney for Respondent
NACOGDOCHES COUNTY

CERTIFICATE OF SERVICE

I certify that on April 28, 2022, a true and correct copy of Respondent's Plea in Abatement was served on Paul Anderson PLLC, attorney for Paul Anderson, electronically through the electronic filing manager.



John T. Fleming


STATE OF TEXAS

COUNTY OF NACOGDOCHES

Before me, the undersigned notary, on this day personally appeared John Fleming, the affiant, whose identity is known to me. After I administered the oath, affiant testified as follows:

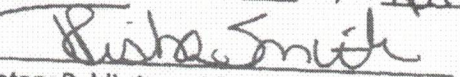
"My name is John Fleming. I am capable to making this verification. I have read the Facts

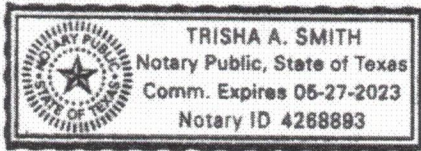
section of the Plea in Abatement. The facts stated in the Facts section are, to the best of my knowledge, true and correct."


John Fleming

Sworn to and subscribed to before me, by John Fleming on the 20th day of April

 , 2022


Notary Public in and for the State of Texas



Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Trisha Smith on behalf of John Fleming
Bar No. 788981
tasmith@co.nacogdoches.tx.us
Envelope ID: 64012253
Status as of 4/28/2022 4:18 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
E-Filing Anderson PLLC		efile@paulandersonlaw.com	4/28/2022 3:35:08 PM	SENT



JESSICA OLIVAREZ

PAUL ANDERSON, PLLC
ATTORNEY AT LAW

601 North Street | Nacogdoches, TX 75961 | 936.305.5600(o) | 936.236.6242 (fax)

February 15th, 2022

Ms. Jessica Corley
County Auditor
Nacogdoches County
101 W. Main Street, Ste 140
Nacogdoches, Texas 75961

jcorley@co.nacogdoches.tx.us

PUBLIC INFORMATION ACT REQUEST

RE: Nacogdoches County payment records to Texas Association of Counties-Risk Management Pool.

This Texas Public Information Act Request Seeks the following records:

A true and accurate copy of all payments to the Texas Associations of Counties – Risk Management Pool from January 1, 2020, thru date of request. Please include claim numbers for each payment, date the claim was filed, and all parties involved in each claim (if possible).

My office will, of course, reimburse you for all cost of this request.

Thank you,

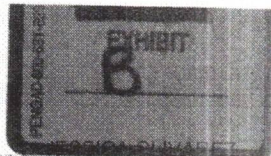
Respectfully,

A handwritten signature in black ink, appearing to be "PA" with a long horizontal stroke extending to the right.

PAUL ANDERSON

Exhibit "A"

FLOWERS & DAVIS, P.L.L.C.



CELIA C. FLOWERS
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WILLIAM R. KNIGHT, JR.
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CATHERINE CHESLEY GOODGION
COREY R. KELLAM
MAYA P. JEDLIKA
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STEVE M. MASON
JOHN "JACK" R. FULGHAM

IMMIGRATION:
VIRGINIA D. YOUNG
DANIEL C. ROSS
TELEPHONE: (903) 592-8186

March 1, 2022

Via CM/RRR: 7014 2120 0001 7708 3737

Texas Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Nacogdoches County's Requested Exceptions to the Public Information Act
Request from Paul Anderson dated 2/15/2022

Dear Attorney General Paxton:

Please be advised that this law firm represents Nacogdoches County regarding the above-referenced Public Information Act request which was received by email on February 15, 2022, from Attorney Paul Anderson. See Exhibit A. Please allow this letter to serve as Nacogdoches County's request for an Attorney General Opinion tendered within 10 business days of the request. Nacogdoches County will submit its brief and supporting documentation within 15 business days of the request. The subject matter of this request also concerns the interests of Texas Association of Counties, and they have been notified of this request. See Exhibit B.

In the open records request, Attorney Anderson requests:

A true and accurate copy of all payments to the Texas Associations of Counties – Risk Management Pool from January 1, 2020, thru date of request. Please include claim numbers for each payment, date the claim was filed, and all parties involved in each claim (if possible).

See Exhibit A.

First, the Texas Public Information Act does not require a governmental body to prepare answers to questions or perform research. Furthermore, the information sought by Attorney Anderson is excepted from the Public Information Act on the following grounds:

1. **The "litigation exception" as set forth in Texas Government Code § 552.103.**
2. **Information within the attorney-client privilege or the work-product privilege - See Tex. Gov't Code § 552.107(1), 552.111.**
3. **Information constituting work product pursuant to Texas Government Code § 552.111.**
4. **"Information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including attorney-client privileged information and work product. Tex. Gov't Code § 552.101; Tex. R. Evid. 503; Tex. R. Civ. P. 192.3(e), 192.5.**
5. **Information made confidential by "other law," including attorney-client privileged information and work product. Tex. Gov't Code § 552.022(a); Tex. R. Evid. 503; Tex. R. Civ. P. 192.3(e), 192.5.**
6. **Access and routing numbers protected pursuant to Texas Government Code § 552.136.**

Thank you in advance for your consideration of this important issue.

Very truly yours,



Robert S. Davis

RSD/rho/rlo
Enclosures

cc: Paul Anderson (Requestor)
Attorney at Law
601 North Street
Nacogdoches, TX 75961
(Via CM/RRR: 7014 2120 0001 7708 3553, w/o enclosures)

Texas Association of Counties
c/o Mike Thompson
PO Box 2131
Austin, Texas 78768
(Via Email: miket@county.org, w/o enclosures)

FLOWERS & DAVIS, P.L.L.C.



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JOHN "JACK" R. FULGHAM

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March 7, 2022

Via CM/RRR: 7014 2120 0001 7708 3638

Texas Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Nacogdoches County's Requested Exceptions to the Public Information Act
Request from Paul Anderson dated 2/15/2022

Dear Attorney General Paxton:

Please be advised that this law firm represents Nacogdoches County regarding the above-referenced Public Information Act request which was received by email on February 15, 2022, from Attorney Paul Anderson. See **Exhibit A**. Nacogdoches County requested an Attorney General Opinion relating to disclosure of documents which could be responsive to such request on March 1, 2022, which was within 10 business days of the request. See **Exhibit B** attached hereto. Please allow this letter to serve as Nacogdoches County's brief with the required attached documents as required by statute, tendered within 15 business days of the request. Nacogdoches County was closed on February 21, 2022 in observance of President's Day. The subject matter of this request also concerns the interests of Texas Association of Counties, and they have been notified of this request. See **Exhibit C**.

In the open records request, Attorney Anderson requests:

A true and accurate copy of all payments to the Texas Associations of Counties – Risk Management Pool from January 1, 2020, thru date of request. Please include claim numbers for each payment, date the claim was filed, and all parties involved in each claim (if possible).

See Exhibit A.

First, the Requestor asks several questions, but the Texas Public Information Act does not require a governmental body to prepare answers to questions or perform research. Furthermore, the information sought by Attorney Anderson is excepted from the Public Information Act on the following grounds:

1. The "litigation exception" as set forth in Texas Government Code § 552.103.

The Requestor currently has at least three pending lawsuits against Nacogdoches County and/or Nacogdoches County personnel and has sent notice of claim letters in at least five anticipated lawsuits. Attached as **Exhibit D** are the three lawsuits filed by the Requestor. Attached as **Exhibit E** are the five notice of claim letters sent by the Requestor that conform with the requirements of the Texas Tort Claims Act.

Section 552.103 prevents the disclosure of information relating to litigation in which the entity is or may be a party. TEX. GOV'T CODE ANN. § 552.103. Specifically, in relevant part, Section 552.103, states:

(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.

TEX. GOV'T CODE ANN. § 552.103(a), (c). The purpose of this litigation exception is to allow a governmental body to protect its position in litigation "by forcing parties seeking information relating to that litigation to obtain it through discovery" procedures. Tex. Att'y Gen. ORD-551 at 3 (1990). If Nacogdoches County shows that the (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, the information should be excepted under Section 552.103(a). *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).

This exemption applies to the documents requested here because the responsive information relates to pending litigation and litigation reasonably anticipated by Nacogdoches County. See **Exhibits D and E**. The Requestor, Attorney Paul Anderson, has filed several lawsuits and sent several notice of a claim letters which seek liability on the part of Nacogdoches County and its employees and elected officials. *Id.* In the notice letters, the Requestor makes "policy-limits" demands and copied the Texas Association of Counties. See **Exhibit E, pp. 1-2, 4, 6, 8, 10**.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). Nacogdoches County must show concrete evidence that litigation is reasonably anticipated, not mere conjecture. *Id.* Here, the requesting attorney filed lawsuits and sent the County multiple notice of claim letters, as required pre-lawsuit, by the Texas Tort Claims Act. The objective steps taken towards filing suit occurred before the County's receipt of this Request. The requested information expressly relates to the pending and anticipated litigation because Texas Association of Counties provides the defense and coverage for these cases.

The litigation exception applies to all requested documents, and representative samples are attached hereto as **Exhibit F**.

2. **Information within the attorney-client privilege - See Tex. Gov't Code § 552.107(1); Tex. Gov't Code § 552.101 in conjunction with Tex. R. Evid. 503 ("Information considered to be confidential by law, either constitutional, statutory, or by judicial decision"); Tex. Gov't Code § 552.022(a) in conjunction with Tex. R. Evid. 503 ("other law").**

The information requested is protected from disclosure under the attorney-client privilege. The attorney-client privilege found in Texas Rule of Evidence 503 is included in several sections of the Texas Public Information Act as "other law" and "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." See Tex. Gov't Code §§ 552.022(a); 552.101. Texas courts have held that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" within the meaning of section 552.022, and that the attorney-client privilege may also be raised under sections 552.101 and 552.107. See *In re Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); *Abbott v. City of Dallas*, 453 S.W.3d 580, 586 (Tex.App. - Austin 2014, *aff'd* 509 S.W.3d 247 (Tex. 2017)).

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 "client," for the purposes of the attorney-client privilege, is defined as "a person, public officer, or corporation, association, or other organization or entity – whether public or private – that: (A) is rendered professional services by a lawyer, or (B) consults a lawyer with a view to obtaining professional legal services from the lawyer." *Id.* 503(a)(1). A "client's representative" is defined as either:

- (A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or
- (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.

Id. 503(a)(2). 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).

Therefore, 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 confidential information; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining that 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).

I have attached as **Exhibit F** a representative sample of the claims payments made by Nacogdoches County to Texas Association of Counties Risk Management Pool ("TAC"). TAC is a representative of Nacogdoches County under Rule 503(a)(2) because under an agreement between TAC and the County, TAC is specifically authorized to provide a

defense for the County, including the employment of defense counsel and a claims manager. The payment information is a privileged attorney-client communication transmitted between privileged parties, specifically by and between retained counsel Flowers Davis, PLLC (which includes Robert Davis, Lee Correa and Robin O'Donoghue), Nacogdoches County (which includes Judge Sowell, Keith Bradford, Shannon Burkley, and Jessica Corley) and TAC (which includes Tanya Davis and Brittany Davis). These communications are not intended to be disclosed, and have not been disclosed, to third parties and were made in furtherance of the rendition of professional legal services. The attorney-client privilege extends to the entire payment document. *Huie*, 922 S.W.2d at 923.

3. **Information constituting work product pursuant to Texas Government Code § 552.111; Tex. Gov't Code § 552.101 in conjunction with Tex. R. Civ. P. 192.3(e), 192.5 ("Information considered to be confidential by law, either constitutional, statutory, or by judicial decision"); Tex. Gov't Code § 552.022(a) in conjunction with Tex. R. Civ. P. 192.3(e), 192.5 ("other law").**

The attorney work-product privilege also protects the release of the requested documents. The Texas Supreme Court has held that the Texas Rules of Civil Procedure, including the work-product privilege, are "other law" within the meaning of the Texas Public Information Act. *See In re City of Georgetown*, 53 S.W.3d at 336.

The Texas Supreme Court has also held that the responsive payment information subject to the current request is protected by the work-product privilege. *See In re Nat. Lloyds Ins. Co.*, 532 S.W.3d 794, 803 (Tex. 2017). In holding that these type of records are protected under the work-product privilege found in Texas Rules of Civil Procedure 192.5, the Court held that a request for all billing information invades a party's work-product privilege because, cumulatively, billing records constitute a mechanical compilation of information that, at least incidentally, reveals an attorney's strategy and thought processes. *Id.* Particularly relevant to this request, is that the Requestor has several claims against Nacogdoches County. *See Exhibits D, E.* The Court in *Nat. Lloyds Ins.* noted that when a party is a repeat litigant, as Nacogdoches is here with respect to the Requestor, "decisions revealed through billing records represent strategic choices and are pieces of 'an overall legal strategy for all the cases in which it is involved,' which a party must be allowed to develop without intrusion." *Id.* at 804 (citing *Owens-Corning Fiberglass Corp. v. Caldwell*, 818 S.W.2d 749, 751 (Tex. 1991)(orig. proceeding)). The Court found that discovery of billing/payment information like the currently requested documents would provide a roadmap of how the insurer plans to litigate not only one case, but all other cases involving the party. *Id.* at 805. Also, the work-product privilege applies to the entire document or file as redactions of a portion "would be inadequate." *Id.* at 805-06.

For these reasons, Nacogdoches County requests that the responsive documents be excluded from disclosure under the Texas Public Information Act. A representative sample of the requested documents are attached as **Exhibit F**.

4. Access and routing numbers protected pursuant to Texas Government Code § 552.136.

The request includes documents protected by § 552.136. This information can be found in Exhibit F, Bates Nos. NC001, NC012, NC023.

Thank you in advance for your consideration of this important issue.

Very truly yours,



Robert S. Davis

RSD/rho/rlo
Enclosures

cc: Paul Anderson (Requestor)
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Nacogdoches, TX 75961
(Via CM/RRR: 7014 2120 0001 7708 3645, w/o enclosures)

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c/o Mike Thompson
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