



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2008

Mr. Matt Morrison
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P.O. Box 21117
Waco, Texas 76702-1117

OR2008-02112

Dear Mr. Morrison:

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# 302371.

The Falls County Water Control and Improvement District No. 1 (the "district"), which you represent, received a request for its records and files. The district seeks to withhold the submitted representative samples of information under sections 552.103 and 552.107 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and have reviewed the submitted information.²

We first note that the district did not raise Texas Rule of Civil Procedure 192.5 within the ten-business-day period prescribed by section 552.301(b) of the Government Code. The district's assertion of the attorney work product privilege under rule 192.5 is not a

¹We note that you also raise section 552.101 of the Government Code, which exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You do so, however, in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Therefore, because section 552.101 does not encompass discovery privileges, this decision does not address section 552.101. *See* Open Records Decision No. 676 at 1-3 (2002).

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), 302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under TEX. R. CIV. P. 192.5 does not provide compelling reason for non-disclosure if claim does not implicate third party rights); *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Consequently, the district has waived rule 192.5 and may not withhold any of the submitted information on that basis.

We next note that the submitted information includes ordinances, resolutions, and orders adopted by the district. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). Therefore, the ordinances that we have marked must be released. The resolutions that we have marked are analogous to ordinances and as such must also be released. The orders that we have marked appear to have been adopted at public meetings of the district and thus are official records of a governmental body's public proceedings. As such, the orders that we have marked also 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").

The submitted information also includes notices and minutes of meetings of the district's board of directors. Notices and minutes of a governmental body's public meetings are specifically made public under provisions of 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), 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for 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 that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the district must also release the meeting notices and minutes that we have marked.

We also note that section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a) provides for required public disclosure of the following types of information unless the information is expressly confidential under 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(15) information regarded as open to the public under an agency's policies;

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (15)-(17). We have marked the information that is subject to section 552.022. The district must also release that information unless it is expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code, which you raise, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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); 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 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is subject to section 552.022 under section 552.103 or section 552.107. You also claim, however, that Texas Rule of Evidence 503 is applicable to some of submitted information. The Texas Supreme Court has held that 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). Therefore, we will determine whether rule 503 is applicable to any of the information that is subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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 for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; 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 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. 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, no writ).

You contend that information at Tabs 2, 8, 10, and 12 consists of privileged attorney-client communications.³ Having considered your arguments, we find that you have not demonstrated that rule 503 is applicable to any information at Tabs 2, 8, 10, or 12 that falls within the scope of section 552.022. We therefore conclude that the district may not withhold any of that information on the basis of the attorney-client privilege under rule 503.

With regard to the remaining information, we turn to your claims under sections 552.103 and 552.107 of the Government Code. Section 552.103 provides in 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.

³Although you also seek to withhold information at Tab 14 on this basis, we note that no information was submitted at Tab 14.

...

(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.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and that the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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).*

You seek to withhold the remaining information under section 552.103. You state that the remaining information is related to a pending eminent domain lawsuit filed by the district in which the requestor is an attorney for the defendant. You assert that the information in question is related to issues raised in the lawsuit by the defendant. We find, however, that you have not sufficiently explained how or why the remaining information is related to the litigation. *See Open Records Decision Nos. 551 at 5 (1990)* (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under Gov’t Code § 552.103 if its release would impair governmental body’s litigation interests). We therefore conclude that the district may not withhold any of the remaining information under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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 Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of

attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You contend that the information at Tabs 2, 8, 10, and 12 includes privileged communications between representatives of the district and its attorneys. You have identified some of the parties to the communications. You do not indicate that the privilege has been waived. Based on your representations and our review of the information at issue, we have marked information that the district may withhold under section 552.107(1).

We note that the district may be required to withhold some of the remaining information under section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. 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 the 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 or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. To the extent that the

⁴Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

information that we have marked under section 552.117 consists of the home address, home telephone number, or family member information of a current or former district official or employee, the marked information must be withheld under section 552.117(a)(1) to the extent that the individuals concerned timely requested confidentiality for their home addresses, home telephone numbers, or family member information under section 552.024.⁵

We also note that section 552.136 of the Government Code is applicable to some of the remaining information.⁶ Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked account and insurance policy numbers that the district must withhold under section 552.136.

Lastly, we note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the district may withhold the information that we have marked under section 552.107(1) of the Government Code; (2) to the extent that the information that we have marked under section 552.117 of the Government Code consists of the home address, home telephone number, or family member information of a current or former district official or employee, the marked information must be withheld under section 552.117(a)(1) to the extent that the individuals concerned timely requested confidentiality for their home addresses, home telephone numbers, or family member information under section 552.024 of the Government Code; and (3) the district must withhold the marked account and

⁵We note that a post office box number is not a “home address” for purposes of section 552.117. *See* Gov’t Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov’t Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

⁶Section 552.136 also is a mandatory exception and may not be waived. *See* Gov’t Code §§ 552.007, .352; ORD 674 at 3 n.4.

insurance policy numbers under section 552.136 of the Government Code.⁷ The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

⁷We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 302371

Enc: Submitted documents

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