



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2008

Ms. Heather R. Rutland
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OR2008-04527

Dear Ms. Rutland:

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# 306822.

The Lockhart Independent School District (the "district"), which you represent, received a request for 1) the public portions of personnel files of two specified former employees and 2) any reports, correspondence or other records related to an investigation of the two former employees. You state the district has released most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered your arguments against disclosure and have reviewed the submitted information.

Initially, we note that Exhibits B and C are subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are 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.

Gov't Code § 552.022(a)(1). In this instance, Exhibits B and C consist of completed investigations made for or by the district. The district must release the completed investigations under section 552.022(a)(1) of the Government Code unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they

are not other law that make information confidential for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Therefore, Exhibits B and C may not be withheld on the basis of section 552.107 or section 552.111. However, the attorney-client privilege, which you raise for Exhibit B, is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and 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); *see also* Open Records Decision No. 676 (2002). Accordingly, we will address your attorney-client argument for Exhibit B under Texas Rule of Evidence 503. As you raise no other exceptions to disclosure of Exhibit C, it must be released.

Texas Rule of Evidence 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. A communication is “confidential” if 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that Exhibit B documents communications between the district's former attorney and the district's board of trustees. You explain, and the documents reflect, that these communications were made for the purpose of facilitating the rendition of professional legal services to the district. You also state that the communications were intended to be and have remained confidential. Based on your representations and our review, we agree that Exhibit B is a privileged, attorney-client communication. Therefore, the district may withhold Exhibit B under rule 503.

Next, we consider your argument that Exhibit A is excepted from disclosure under section 552.107 of the Government Code. 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 are the same as those discussed for Rule 503. 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 state that Exhibit A is a communication between the district's attorneys and the district's board of trustees, and that this communication was made in furtherance of the rendition of legal services to the district. You further state that this communication was made in confidence, intended for the sole use of the district and its attorneys, and that it has not been shared or distributed to others. Based on our review of your representations and Exhibit A, we find that you have demonstrated the applicability of the attorney-client privilege to Exhibit A. Accordingly, the district may withhold Exhibit A under section 552.107 of the Government Code.

In summary, the district may withhold Exhibit A under section 552.107 of the Government Code and Exhibit B under Rule 503 of the Texas Rules of Evidence. Exhibit C must be released.

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.

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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 306822

Enc. Submitted documents

c: Ms. Molly Bloom
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(w/o enclosures)