ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2008

Mr. David Backus
Underwood, Wilson, Berry, Stein & Johnson, P.C.
P.O. Box 16197
Lubbock, Texas 79490

OR2008-10168

Dear Mr. Backus:

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# 317626.

The Klondike Independent School District (the "district"), which you represent, received a request for the certification of a named individual, as well as the district's insurance liability limits. You state that you have provided the requestor with some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code is applicable to the submitted information. Section 552.022 provides in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, 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:
>
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted insurance policy records consist of information in a contract relating to the expenditure of funds by a governmental body. Thus, pursuant to section 552.022(a)(3), the district may only withhold the submitted insurance policies if they are confidential under other law. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We note that this section is a discretionary exception that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold the submitted information under section 552.107. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether the district may withhold the submitted information under Texas Rule of Evidence 503. Furthermore, because information subject to section 552.022(a)(3) may be withheld under section 552.101 of the Government Code, we will address your argument under this exception for the submitted information.

You contend that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 101.104 of the Civil Practice and Remedies Code provides:

> (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].
>
> (b) Neither the existence nor the amount of the insurance is subject to discovery.

Civ. Prac. & Rem. Code § 101.104. Section 101.104 provides that insurance information is not discoverable or admissible as evidence during litigation proceedings under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *See City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.—Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under the Tort Claims Act). Section 101.104, however, is a civil discovery privilege and does not make insurance information expressly confidential for purposes of section 552.101. *See* Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 647 at 2 (1996) (information that may be privileged in the civil discovery context may not be withheld from disclosure pursuant to section 552.101 of the Government Code), 575 at 2 (1990) (stating explicitly that discovery privileges are not

covered under statutory predecessor to section 552.101). As we have already noted, the Texas Supreme Court has determined that the discovery privileges found in the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Although section 101.104 is a civil discovery privilege under the Civil Practice and Remedies Code, it is not a discovery privilege found in either the Texas Rules of Civil Procedure or the Texas Rules of Evidence. Thus, section 101.104 does not alone, or in conjunction with the *Georgetown* decision, constitute "other law" for purposes of section 552.022. Accordingly, we determine that the submitted information may not be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege, and 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 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).

The submitted information consists of the district's legal liability contract. You have not informed us that this information was communicated between privileged parties for the purpose of facilitating the rendition of professional legal services. Accordingly, the submitted information may not be withheld on this basis. As you raise no other exceptions against disclosure, the submitted information 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). If the governmental body does not file suit over 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).

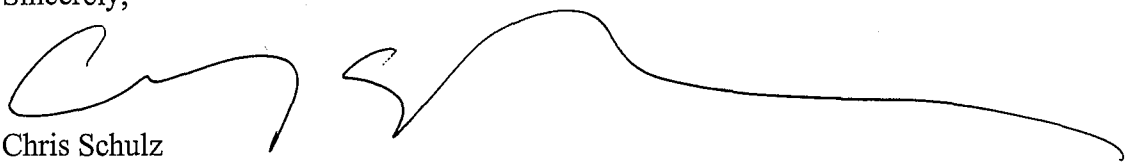
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/mcf

Ref: ID# 317626

Enc. Submitted documents

c: Nicky Chapman
3102 County Road O
Lamesa, Texas 79331
(w/o enclosures)