ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2009

Mr. Miguel A. Saldaña
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.
103 East Price Road, Suite A
Brownsville, Texas 78521

OR2009-12064

Dear Mr. Saldaña:

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# 353632 (PIR# 4796).

The Brownsville Independent School District (the "district"), which you represent, received a request for information pertaining to the termination of a named district employee. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note section 552.022 of the Government Code is applicable to the submitted information. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of documents that are part of a completed investigation and thus subject to section 552.022(a)(1). Although you seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See 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 section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1)

[1]Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information under sections 552.103, 552.107, or 552.111 of the Government Code. However, the attorney-client privilege is also found in Texas Rule of Evidence 503, which can serve as other law for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of Texas Rule of Evidence 503 to information encompassed by section 552.022 of the Government Code). Thus, we will consider the applicability of this provision. Because section 552.101 is "other law" for the purpose of section 552.022, we will also consider the applicability of this exception.

You assert that the submitted information is confidential under sections 551.071 and 551.074 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 551.071 permits a governmental body to consult with its attorney in a closed meeting, and section 551.074 allows a governmental body to conduct certain deliberations about employees in an executive session. *See* Gov't Code §§ 551.071, .074. These provisions do not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, the district may not withhold any of the submitted information under section 552.101 in conjunction with either section 551.071 or 551.074 of the Government Code.

You contend that the submitted information is protected by the attorney-client privilege. Rule 503 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 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).

You explain that the submitted information consists of an investigation file pertaining to allegations of misconduct by a district employee. You indicate that the submitted information was gathered and created by an outside attorney hired by the district for the purpose of providing legal advice to the district. You explain that this information was communicated by the outside attorney to district representatives. You also state that this information was intended to be confidential.

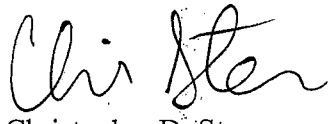
However, we note that the submitted documents indicate that the responsive information may have already been released to the attorney representing the individual who was the subject of the investigation at issue. Texas Rule of Evidence 511 states a person waives the discovery privileges if she voluntarily discloses the privileged information unless such disclosure itself is privileged. TEX. R. EVID. 511. *See Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex.1986). In *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990), the court held that because privileged information was disclosed to the Federal Bureau of Investigation, the Internal Revenue Service, and the Wall Street Journal, the attorney-client and work product privileges were waived. In this case, you have not demonstrated how the attorney who represents the individual who was the subject of the district's investigation would be a privileged party. Thus, we find that release of the information at issue to this attorney would constitute a voluntary waiver of the attorney-client privilege for purposes of Rule 511. *See id.*; *In re Bexar County Criminal Dist. Attorney's Office,* 224 S.W.3d 182 (Tex., 2007) (district attorney waived work product privilege for case file by disclosing file to private litigant pursuant to subpoena duces tecum without

objection). Because we are unable to determine whether the district voluntarily disclosed the information at issue to a non-privileged party, we must rule conditionally. If the district voluntarily disclosed the information at issue to a non-privileged party, the submitted information may not be withheld on the basis of Texas Rule of Evidence 503 and must be released to the requestor. However, if the district has not voluntarily disclosed the information at issue to a non-privileged party, the submitted information is protected by the attorney-client privilege and may be withheld under Rule 503 of the Texas Rules of Evidence. *See Harlandale Independent School District*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney's entire investigative report was 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).

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 353632

Enc. Submitted documents

c: Requestor
(w/o enclosures)