



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2011

Mr. Tony Resendez
Walsh, Anderson, Brown, Gallegos & Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2011-01265

Dear Mr. Resendez:

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# 406895.

The Donna Independent School District (the "district"), which you represent, received a request for all e-mails to and from a named district administrator during a specified time period. You claim portions of the submitted information are 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 pages AG-0024 and AG-0025 of the submitted information consist of a resolution adopted by the district's board of trustees (the "board"). 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). The submitted resolution is analogous to an ordinance. Moreover, the resolution appears to have been adopted at a public meeting of the board and thus is an official record of a governmental body's public proceedings. *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"). Therefore, the district must release the resolution on pages AG-0024 and AG-0025.

Next, we note some of the remaining information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(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). In this instance, a portion of the information consists of a contract subject to section 552.022(a)(3). The county may only withhold the information subject to section 552.022(a)(3) if it is confidential under other law. Although you raise section 552.107 of the Government Code for this information, this section is not "other law" for purposes of section 552.022(a)(3). *See id.* § 552.007; 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). Therefore, the district may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. The Texas Supreme Court has held, however, 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). The attorney-client privilege, which you claim under section 552.107(1), is found at Texas Rule of Evidence 503. Accordingly, we will determine whether the district may withhold any of the information subject to section 552.022(a)(3) under rule 503. We also will address your claims under sections 552.101 and 552.107 for the information not encompassed by section 552.022(a)(3).

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 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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the submitted contract subject to section 552.022(a)(3) of the Government Code is part of a privileged communication you wish to withhold under rule 503. You contend this attorney-client communication was made in connection with the rendition of professional legal services to the district. You indicate the communication was intended to be and remains confidential. Accordingly, the district may withhold the submitted contract on the basis of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

You assert pages AG-0001 through AG-0012 are protected under common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that: (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate

children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find none of the information in pages AG-0001 through AG-0012 is highly intimate or embarrassing and of no legitimate public interest. Furthermore, as this office has often stated, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.,* Open Records Decision Nos. 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 455 (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Therefore, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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 pet.). 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).

The district seeks to withhold pages AG-0013 through AG-0018 and AG-0026 through AG-0037 under section 552.107(1). You contend this information constitutes attorney-client communications that were made in connection with the rendition of professional legal services to the district. You indicate the communications were intended to be and remains confidential. Based on these representations and our review of the information at issue, we conclude the department may generally withhold pages AG-0013 through AG-0018 and AG-0026 through AG-0037 under section 552.107(1) of the Government Code. However, we note some of the individual e-mails and attachments contained in one otherwise privileged e-mail string consist of communications with individuals you have not established are privileged parties. Therefore, to the extent these non-privileged e-mails and attachments, which we have marked, exist separate and apart from the otherwise privileged e-mail string, they may not be withheld under section 552.107.

We note the non-privileged e-mails contain e-mail addresses. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).¹ *See Gov’t Code* § 552.137(a)-(c). Section 552.137(c) excludes e-mail addresses provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent, those contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract. *See Gov’t Code* § 552.137(c). Therefore, to the extent the e-mail addresses we have marked in the non-privileged e-mail strings are not specifically excluded by section 552.137(c), the district must withhold them under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.² *See id.* § 552.137(b).

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

We further note some of the remaining information may be subject to section 552.117 of the Government Code. 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. *See Gov't Code §§ 552.024, 117.* We note section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-7 (1988)* (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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 under section 552.024 that the information be kept confidential. You do not indicate whether the employees whose information is at issue requested confidentiality pursuant to section 552.024. Accordingly, if the employees timely elected confidentiality, then the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, if any of the cellular telephone numbers we have marked under section 552.117(a)(1) are from a cellular telephone service paid for by the district, then those telephone numbers must be released. If the employees did not timely elect confidentiality, the district may not withhold any of the marked information under section 552.117(a)(1).

In summary, the district must release the board resolution on pages AG-0024 and AG-0025. The district may withhold the submitted contract on the basis of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. The district may withhold pages AG-0013 through AG-0018 and pages AG-0026 through AG-0037 under section 552.107 of the Government Code; however, the district may only withhold the non-privileged e-mails and attachments we have marked within the otherwise privileged e-mail strings if the non-privileged e-mails and attachment do not exist separate and apart from the e-mail strings. To the extent the e-mail addresses we have marked in the non-privileged e-mail strings are not specifically excluded by section 552.137(c) of the Government Code, the district must withhold them under section 552.137, unless the owners of the addresses have affirmatively consented to their release. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employees whose information is at issue timely requested confidentiality, but the district may only withhold the cellular telephone numbers we marked if the cellular telephone services are not paid for with district funds. The district must release the remaining information.

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, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 406895

Enc. Submitted documents

c: Requestor
(w/o enclosures)