



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2012

Ms. LeAnne Lundy
For Fort Bend Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-06540

Dear Ms. Lundy:

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# 452518.

The Fort Bend Independent School District (the "district"), which you represent, received a request for four categories of information pertaining to the Fort Bend Mechanical school board agenda item on February 13, 2012. You state the district released the majority of the requested information to the requestor, including Exhibits A, D, F, I, and a portion of Exhibit H in the submitted information. You claim that the remaining submitted information is excepted from disclosure under sections 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 the submitted information consists of a completed report and is, therefore, subject to section 552.022(a)(1) of the Government Code. 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 made confidential under this chapter or other law or is excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you claim these records are subject to sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 676

¹Although 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).

at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the submitted information may not be withheld under sections 552.107 and 552.111. However, the attorney-client privilege found in Texas Rule of Evidence 503 is “other law” for the purposes of section 552.022. *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). Therefore, we will consider your attorney-client privilege argument under Texas Rule of Evidence 503. We note section 552.117 of the Government Code makes information confidential under the Act for purposes of section 552.022.² Therefore, we will also consider the applicability of this exception to the information subject to section 552.022.

Rule 503 of the Texas Rules of Evidence 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). When asserting the attorney-client privilege, a

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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* ORD 676 at 6-7.

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 assert that the report contained in Exhibit 2, including Exhibits B, C, E-1, E-2, G, J, and portions of H of this report are excepted from disclosure under rule 503 of the Texas Rules of Evidence. You state the information at issue consists of communications and reports prepared by and communicated to and from attorneys representing the district and various district employees made in furtherance of the rendition of professional legal services by the attorneys to the district. You claim these communications have not been viewed by any other parties, and the confidentiality of the communications has been maintained. Therefore, based on your representations and our review, we conclude the district may withhold the information at issue under rule 503 of the Texas Rules of Evidence. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report is protected by attorney-client privilege where attorney was retained to conduct investigation in capacity as attorney for purpose of providing legal services and advice).

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is 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 piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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 employee who did not timely request under section 552.024 the information be kept confidential. We have marked in Exhibit I cellular telephone numbers of district employees. To the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is paid for with personal funds, the district must withhold the cellular telephone numbers we have marked in Exhibit I under section 552.117(a)(1) of the Government Code.

In summary, we agree the district may withhold the report in Exhibit 2, as well as Exhibits B, C, E-1, E-2, G, J, and the portions of H you have indicated, under rule 503 of the Texas Rules of Evidence. To the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is paid for with personal funds, the district must withhold the cellular telephone numbers we have marked in Exhibit I under section 552.117(a)(1) of the Government Code.

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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/dls

Ref: ID# 452518

Enc. Submitted documents

c: Requestor
(w/o enclosures)