



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 11, 2012

Mr. William Schultz  
Assistant District Attorney  
Denton County  
P.O. Box 2850  
Austin, Texas 76202

OR2012-10750

Dear Mr. Schultz:

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# 458483.

The Denton County Criminal District Attorney's Office (the "district attorney's office") received a request for plea offers pertaining to two specified cases. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code and privileged under Texas Rule of Evidence 503.<sup>1</sup> We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-18555 (2011). In that ruling, we found the district attorney's office may withhold the information at issue under section 552.108(a)(4) of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the district attorney's office may continue to rely on that ruling as a previous determination and withhold the previously ruled upon information in accordance with Open

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

Records Letter No. 2011-18555. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not ruled on in Open Records Letter No. 2011-18555, we will address your arguments against disclosure.

Next, we note some of the submitted information consists of court-filed documents that are subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record,” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Although the district attorney’s office seeks to withhold this information under sections 552.103, 552.107, and 552.108 of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *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. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district attorney’s office may not withhold the marked court-filed documents under section 552.103, section 552.107, or section 552.108. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. Further, section 552.101 of the Government Code makes information confidential under the Act. Therefore, we will also consider the applicability of this exception to the submitted information subject to section 552.022.

You claim the submitted information subject to section 552.022 is excepted from disclosure under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 408. 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. This section encompasses information made confidential by other statutes. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision’s structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Rule 408 of the Texas Rules of Evidence governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. Because rule 408 does not explicitly provide that information is confidential, we find the district attorney’s office may not withhold the information at issue

from the requestor under section 552.101 of the Government Code in conjunction with rule 408.

Rule 503(b)(1) of the Texas Rules of Evidence provides the following:

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.

*Id.* 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show 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 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

Upon review, we find you have failed to establish the submitted court-filed documents subject to section 552.022 constitute privileged attorney-client communications. Thus, the district attorney's office may not withhold this information on that basis. As no further exceptions to disclosure have been raised for the court-filed documents subject to section 552.022, they must be released.

Next, we address your claims for the remaining information. Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body claiming an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You contend the remaining information constitutes internal records prepared by a prosecutor in the district attorney's office. You further assert this information reflects the mental impressions and legal reasoning of the prosecutor and reveals trial preparation and plea bargaining strategies. Based on your representations and our review, we find the remaining information reflects the mental processes or legal reasoning of an attorney representing the state. We therefore conclude the district attorney's office may withhold the remaining information under section 552.108(a)(4) of the Government Code.<sup>2</sup>

In summary, the district attorney's office may continue to rely on Open Records Letter No. 2011-18555 as a previous determination and withhold the previously ruled upon information in accordance with that ruling. The district attorney's office must release the court-filed documents subject to section 552.022(a)(17) of the Government Code. The district attorney's office may withhold the remaining information under section 552.108(a)(4) of the Government Code.

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<sup>2</sup>As our ruling is dispositive, we do not address your remaining arguments against disclosure.

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](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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/bhf

Ref: ID# 458483

Enc. Submitted documents

c: Requestor  
(w/o enclosures)