



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2012

Ms. Donna L. Johnson
Counsel for Harris County Attorney's Office
Olson & Olson, LLP
2727 Allen Parkway
Houston, Texas 77019-2133

OR2012-11877

Dear Ms. Johnson:

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# 460260.

The Harris County Attorney's Office (the "county attorney's office"), which you represent, received a request for reports or documents created by a named assistant county attorney in a specified investigation. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments received from the requestor under section 552.304 of the Government Code and your response to our letter of July 10, 2012, seeking additional information required for our decision under section 552.303 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released); *see also id.* § 552.303 (providing that attorney general may request submission of additional information attorney general determines is necessary to render decision).

¹Although we understand you to raise the attorney work product privilege, you make no arguments concerning this exception as required by section 552.301. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address the work product privilege.

Initially, we note the submitted information consists of a completed report subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). Although you raise sections 552.107 and 552.111 of the Government Code for this information, these are discretionary exceptions to disclosure that may be waived and do not make information confidential under the Act. *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), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.107 and 552.111 do not make information confidential for the purposes of section 552.022(a)(1), and the submitted information may not be withheld on those bases. However, you also raise Texas Rule of Evidence 503. The Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Evidence 503(b)(1) 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 it is 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 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. 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 assert the submitted report constitutes a privileged communication between the county attorney and an assistant county attorney concerning an investigation undertaken by the assistant county attorney at the request of a county constable and the county attorney. You state the communication was made in furtherance of the rendition of legal services to the county commissioners court and the county constables. You state the communication at issue was intended to be, and has remained, confidential. However, the requestor states, and you acknowledge, the county attorney’s office has released a public report pertaining to the investigation at issue. Thus, the requestor raises Texas Rule of Evidence 511, which provides that a privilege is waived if a person “discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.”

In response, you state that while a report was released in order to inform the public of the advice provided to the county constable’s offices as a result of the investigation, the released report does not quote the internal report at issue or disclose its contents. You state the internal report was not intended to be, and has not been, released. After a careful review of your representations and the submitted information, we find that the information that was publicly disclosed does not constitute a “significant part” of the submitted report at issue. *See In re Monsanto Co.*, 998 S.W.2d 917 (Tex.App.—Waco 1999, orig. proceeding). Therefore, we conclude release of the public report did not constitute a waiver of the attorney-client privilege under Texas Rule of Evidence 511. Accordingly, we find the county attorney’s office has established the submitted information is protected by the attorney-client privilege under Texas Rule of Evidence 503 and may withhold the submitted information on that basis. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purposes 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, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/akg

Ref: ID# 460260

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Townsend Davis
ABC Inc.
77 West 66th Street
New York, New York 10023
(w/o enclosures)