



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 3, 2012

Ms. Cheryl T. Mehl  
Sierra Blanca Independent School District  
Eichelbaum, Wardell, Hansen, Powell & Mehl, P.C.  
4201 West Parmer Lane, Suite A-100  
Austin, Texas 78727

OR2012-19354

Dear Ms. Mehl:

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# 472934.

The Sierra Blanca Independent School District (the "district"), which you represent, received a request for all bills submitted to the district by your firm within a specified period of time, all payments made to your firm by the district within a specified period of time, all electronic communication between the district and your firm within a specified period of time, all insurance policies that the district has given notice of a claim to within a specified period of time, and all communications between the district and an insurance company concerning a claim, during a specified period of time. You state the district is releasing the insurance policies, correspondence between the district and its insurers, and the amounts paid by the district to your firm. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

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<sup>1</sup>Although you raise section 552.101 in conjunction with the attorney-client privilege under Texas Rule of Evidence 503 and with the attorney work product privilege under Texas Rule of Civil Procedure 192.5, 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).

We first note some of the submitted information, which we marked, was created after the date of the district's receipt of the present request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>2</sup> Thus, the marked information that was created after the district received the present request is not responsive to the request. Therefore, this decision does not address the public availability of that information.

As you acknowledge, Exhibit 3 is subject to section 552.022(a)(16) of the Government Code, which provides:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, Exhibit 3 must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(16). You seek to withhold a portion of Exhibit 3 under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that protects 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not make information confidential under the Act, and Exhibit 3 may not be withheld on that basis. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that makes information confidential for purposes of section 552.022. *See 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 in Exhibit 3 that is subject to section 552.022(a)(16) of the Government Code.

But first, we address your argument under section 552.107(1) of the Government Code for the responsive information in Exhibits 1 and 2 that is not subject to section 552.022(a)(16). Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. ORD 676 at 6-7. First, a governmental body

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<sup>2</sup>*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

must demonstrate that 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. 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. *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 a 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 to only a confidential communication, *id.*, 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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).

You state the responsive information in Exhibits 1 and 2 contain email correspondence between attorneys in your firm and either the superintendent or the district’s business manager and were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information in Exhibits 1 and 2. Accordingly, the district may withhold the responsive information in Exhibits 1 and 2 under section 552.107 of the Government Code.<sup>3</sup>

Rule 503(b)(1) provides as follows:

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 state the attorney fee bills submitted as Exhibit 3 contain confidential communications between district employees and the district's attorneys. You have identified the privileged parties. You state these communications were made in order to facilitate the rendition of legal services to the district. Accordingly, the district may generally withhold the information you have highlighted under Texas Rule of Evidence 503. However, some of the information you have marked either does not reveal a communication, reveals a communication with a party who is not identified as privileged with respect to the

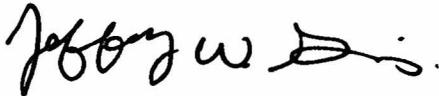
communication, or reveals the creation of a document but does not reflect whether the document was communicated. Accordingly, we conclude rule 503 is not applicable to the information we have marked for release, and it may not be withheld on this basis.

In summary, the district may withhold the responsive information in Exhibits 1 and 2 under section 552.107 of the Government Code. Except where we have marked for release, the district may withhold the information you have highlighted in Exhibit 3 under Texas Rule of Evidence 503. The district must release the remaining responsive 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](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,



Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/dls

Ref: ID# 472934

Enc. Submitted documents

c: Requestor  
(w/o enclosures)