



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2013

Mr. Clyde A. Pine, Jr.
Counsel for the El Paso Independent School District
Mounce, Green, Myers, Safi, Paxon & Galatzan
P.O. Box 1977
El Paso, Texas 79999-1977

OR2013-02527

Dear Mr. Pine:

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# 479040 (MGMSPG ORR No. 2012-448).

The El Paso Independent School District (the "district"), which you represent, received a request for any agreements, contracts, or communications between the district and a named person, all records of payment made by the district to the named person, and any invoices submitted to the district by the named person. You state the district has released or will release some of the requested information. You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Disciplinary Rule of Professional Conduct 1.05.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹We note, and you acknowledge, that although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, 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). Additionally, although you cite to Texas Disciplinary Rule of Professional Conduct 1.03, based on the substance of your arguments, we understand you to claim Texas Disciplinary Rule of Professional Conduct 1.05. However, we note sections 552.101 and 552.107 do not encompass Texas Disciplinary Rule of Professional Conduct 1.05.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note portions of the submitted information are subject to section 552.022(a) of the Government Code, which provides in part:

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(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)(3), (16). In this instance, the submitted information includes checks relating to the expenditure of public funds by the district, which are subject to section 552.022(a)(3), and information in attorney fee bills, which is subject to section 552.022(a)(16). Thus, the district must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless the information is confidential under the Act or other law. *Id.* Although you raise section 552.107 of the Government Code for this information, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold the information subject to section 552.022 under this section. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that makes information expressly 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 for the information subject to section 552.022. We note, however, the Texas Disciplinary Rules of Professional Conduct are not considered other law for purposes of section 552.022. Therefore, we do not address your argument under rule 1.05, and none of the information at issue may be withheld on this basis. *See* ORD 676 at 3-4. Furthermore, because section 552.136 of the Government Code makes information confidential under the Act, we will address the applicability of section 552.136.³ We will also address your arguments for the information not subject to section 552.022.

³The 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).

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 billing entries you have marked in the submitted fee bills are privileged under rule 503. You state the marked information reveals confidential communications with privileged parties, some of whom you have identified as representatives of the district and the district's outside counsel. You also state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. Based on your representations and our review, we find you may generally withhold the information you have marked in the submitted attorney fee bills under Texas Rule of Evidence 503.

However, you have failed to demonstrate the remaining information you have marked in the submitted fee bills or any of the remaining information subject to section 552.022 reveals communications between privileged parties. *See* ORD 676. Thus, except for the information we have marked for release, you may withhold the information you have marked under Texas Rule of Evidence 503.

Section 552.136(b) of the Government Code states “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked bank account and routing numbers in the information subject to section 552.022 which the district must withhold under section 552.136 of the Government Code.⁴

You claim the information not subject to section 552.022 is subject to section 552.107 of the Government Code, which protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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 information not subject to section 552.022 consists of confidential communications between representatives of and attorneys for the district. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. You state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on these representations and our review, we agree section 552.107(1) is applicable to the information at issue, and the district may withhold the information we have marked under section 552.107(1) of the Government Code.⁵

In summary, except for the information we have marked for release, the district may withhold the information you have marked under Texas Rule of Evidence 503. The district must withhold the information we have marked under section 552.136 of the Government Code and may withhold the information we have marked under section 552.107(1) of the Government Code. The district must release the remaining information.

⁴We note section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this 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,

A handwritten signature in cursive script, appearing to read "Kathryn R. Mattingly".

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 479040

Enc. Submitted documents

c: Requestor
(w/o enclosures)