



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2013

Honorable Drew Darby
State Representative, District 72
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2013-08855

Dear Representative Darby:

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# 488771.

The Office of State Representative Drew Darby (the "representative's office") received a request for correspondence between the representative's office and the Office of the Attorney General (the "OAG") concerning House Bill 3840. You claim the requested information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor is a Texas State Representative. Section 552.008 of the Government Code grants access to requested information, including confidential information, to individual members, agencies, or committees of the Texas Legislature. Section 552.008 provides:

- (a) Th[e Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.
- (b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including

confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

...

(c) This section does not affect:

- (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;
- (2) the procedures under which the information is obtained under other law; or
- (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008(a)–(b), (c). In this instance, the requestor is Texas State Representative Trey Martinez Fischer (“Representative Fischer”). Representative Fischer does not state, however, and it is not otherwise clear to this office, his request was made for legislative purposes. Accordingly, we must rule on the applicability of section 552.008 in the alternative. If Representative Fischer made this request for legislative purposes, then the representative’s office must make the submitted information available to him in accordance with section 552.008 of the Government Code. *See id.* § 552.008(b). We note section 552.008 permits a governmental body to require a member of the legislature to sign a confidentiality agreement for the protection of information obtained pursuant to this section. *Id.* In addition, release of this information to Representative Fischer under section 552.008 does not waive or affect the confidentiality of the information for the purposes of state or federal law or waive the right of the representative’s office to assert exceptions to required public disclosure of this information to future requestors. *See id.* But if this request for information was not made for legislative purposes, then the requested information need not be released to Representative Fischer under section 552.008, and we will consider your arguments against its public disclosure.

Before we address your arguments against disclosure, we note most of the submitted information consists of court-filed records. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). Although you seek to withhold this information under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, these are discretionary exceptions to disclosure that protect 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 section 552.103); 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) (governmental body may waive section 552.111). Thus, these exceptions do not make information confidential under the Act, and the representative’s office may not withhold the court-filed records under section 552.103, section 552.106, section 552.107, or section 552.111 of the Government Code. 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). Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege. Therefore, we will address your attorney-client privilege claim under rule 503.

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 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 court-filed records were sent by an attorney for the OAG, which is representing the state in defense of a lawsuit concerning the state's redistricting plan, to the staff of the representative's office and other clients, client representatives, lawyers or lawyer representatives. You state this information was sent to provide recommendations on the redistricting legislation and to facilitate the rendition of legal services, and it was sent with the intention of remaining confidential and have remained confidential. Based on these representations, we find you have demonstrated the attorney-client privilege for these court records. Accordingly, the representative's office may withhold them under rule 503 of the Texas Rules of Evidence.

Next we address the remaining information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under

section 552.107 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 remaining information consists of an e-mail sent by an attorney for the OAG to the staff of the representative's office and other clients and client representatives and other lawyers and lawyer representatives in order to facilitate the rendition of legal services concerning redistricting legislation, and it was sent with the intention of remaining confidential and has remained so. Based on these representations and our review, we agree the representative's office may withhold the remaining information under section 552.107(1) of the Government Code. As our rulings are dispositive, we need not address your remaining arguments.

In summary, if Representative Fischer made the request for legislative purposes, then the representative's office must make the submitted information available to him in accordance with section 552.008 of the Government Code. If Representative Fischer did not make the request for legislative purposes, then the representative's office may withhold the court-filed documents under rule 503 of the Texas Rules of Evidence and the remaining information under section 552.107(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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 488771

Enc. Submitted documents

c: Requestor
(w/o enclosures)