



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 11, 2013

Ms. Pamela Harrell Liston  
Attorney and Counsel for the Trophy Club Municipal Utility District No. 1  
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P.O. Box 1882  
Rowlett, Texas 75030

OR2013-21573

Dear Ms. Liston:

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# 508157.

The Trophy Club Municipal Utility District No. 1 (the "district") received a request for the cost of production and distribution of two specified mailings and one specified advertisement, the total number of documents mailed and the names of the vendors for the two mailings, and any contracts or invoices related to the two mailings. 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. We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor states, and provides documentation showing, that he modified his request via an e-mail sent to the district on September 20, 2013. *See* Gov't Code §§ 552.222(b) (governmental body may communicate with requestor to clarify or narrow request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding ten-day period to request attorney general ruling is measured from date request is clarified or narrowed). In this modification, the requestor sought copies of all checks issued in relation to the production, insertion, printing, and mailing of the documents at issue, in addition to the information originally requested. You have not submitted a copy of this e-mail or copies

of the requested checks to this office. *See* Gov't Code § 552.301(e)(1)(B), (D) (governmental body must provide this office with a copy of the written request for information and a copy of the "specific information requested" or representative sample). We are unable to determine whether the district received the e-mail sent by the requestor on September 20, 2013. Thus, we must rule conditionally. Therefore, to the extent the district received the e-mail from the requestor modifying his request sent on September 20, 2013, and to the extent information responsive to that modification existed and was maintained by the district on the date the district received the modification, we assume you have released it. If you received the e-mail modifying the request and such information existed and was maintained by the district on the date the district received the modification, and you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release the information as soon as possible).

Next, we must address the district's obligations under the Act. Section 552.301(e-1) of the Government Code requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301(e)(1)(A), to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the written request. Gov't Code § 552.301(e-1). Section 552.301(e-1) authorizes the governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* We note the district redacted the entirety of its argument under the work product privilege encompassed by section 552.111 of the Government Code in the copy of the comments sent to the requestor. We further note the redacted portion of the district's comments neither disclose nor contain the substance of the submitted information. We, therefore, conclude the district failed to comply with section 552.301(e-1) in requesting a decision with respect to its argument under section 552.111 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). In general, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you raise section 552.111 of the Government Code, this section is discretionary in nature and serves only to protect a governmental body's interests. As such, the district's claim under this section is not a compelling reason to overcome the presumption of openness. *See* Open Records Decision No 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the district may

not withhold any portion of the submitted information under section 552.111. However, we will address your remaining arguments against disclosure.

Next, we note a portion of the submitted information is 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[.]

Gov't Code § 552.022(a)(3). The submitted information contains a receipt subject to subsection 552.022(a)(3). The district must release this information, which we have marked, unless it is made confidential under the Act or other law. You seek to withhold this information under section 552.107 of the Government Code. However, section 552.107 is a discretionary exception 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 section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning 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 rule 503 of the Texas Rules of Evidence for this information. Furthermore, as section 552.136 of the Government Code can make information confidential under the Act, we will address the applicability of that section to the information subject to section 552.022.<sup>1</sup> In addition, we will consider your arguments under section 552.107 for the information not subject to section 552.022.

With regard to the information not subject to section 552.022 of the Government Code, you argue section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. 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.

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<sup>1</sup>The 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).

First, a governmental body must demonstrate 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. *See* 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. *See 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 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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 only to 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. *See 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 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 information not subject to section 552.022 consists of communications to the district by its attorney, by and between district staff, and/or from the attorney and the attorney’s staff. We note some of the communications also involve a consultant hired by the attorney for the district. You state the information at issue was for the purpose of facilitating the rendition of professional legal services to the district. You state these communications were of a confidential nature and that the privilege regarding this information has not been breached. Based on your representations and our review, we agree section 552.107 is applicable to the submitted information not subject to section 552.022 of the Government Code, and the district may withhold this information under section 552.107(1) of the Government Code.

Next, we address your assertion of the attorney-client privilege for the information subject to section 552.022 of the Government Code. Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 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 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). The elements of the privilege under rule 503 are the same as those discussed for section 552.107 of the Government Code. Upon a demonstration of the 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

As noted, you state the information at issue consists of communications to the district by its attorney, by and between district staff, and/or from the attorney and the attorney's staff. We note some of the communications also involve a consultant hired by the attorney for the district. You state the information at issue was for the purpose of facilitating the rendition of professional legal services to the district. You state these communications were of a confidential nature and that the privilege regarding this information has not been waived. Based on your representations and our review, we agree the information subject to section 552.022 of the Government Code may generally be withheld under rule 503 of the Texas Rules of Evidence. However, we note the information at issue was received from a party you have not shown to be privileged. Furthermore, if this document received from the non-privileged party is removed from the privileged communication to which it is attached and stands alone, it is responsive to the request for information. Accordingly, if this

non-privileged document exists separate and apart from the otherwise privileged communication, it may not be withheld under rule 503 of the Texas Rules of Evidence.

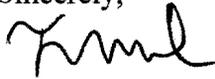
Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, we find the district must withhold the partial credit card number we have marked under section 552.136 of the Government Code.

In summary, the district may generally withhold the information subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence; however if this information is maintained separate and apart from the privileged communication to which it is attached, the district may not withhold this information under rule 503 of the Texas Rules of Evidence. In that event, the district must withhold the partial credit card number we have marked under section 552.136 of the Government Code. The district may withhold 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/dls

Ref: ID# 508157

Enc. Submitted documents

c: Requestor  
(w/o enclosures)