



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2014

Mr. Orlando "Jay" Juarez, Jr.
Counsel for the United Independent School District
J. Cruz & Associates, LLC
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2014-16465

Dear Mr. Juarez:

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# 537684.

The United Independent School District (the "district"), which you represent, received a request for all communications related to the district seeking reimbursement from Webb County (the "county") for bottled water. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 408 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted information.

Initially, we must address the district's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). While you raised section 552.107 of the Government Code within the ten-business-day time period as required by section 552.301(b), you did not raise rule 408 of the Texas Rules of Evidence until after the ten-business-day deadline had passed.

¹Although you also claim the requested information is privileged under rule 503 of the Texas Rules of Evidence, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107 of the Government Code. See Open Records Decision No. 676 at 1 (2002).

Consequently, we find the district failed to comply with the procedural requirements of section 552.301(b) of the Government Code with respect to its claim under rule 408 of the Texas Rules of Evidence.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See generally 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also generally* Open Records Decision No. 630 (1994). Generally, 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). You seek to withhold the information you have marked Exhibit A-2 under rule 408 of the Texas Rules of Evidence. However, we note rule 408 of the Texas Rules of Evidence does not make information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 648 at 3 (1996), 478 at 2 (1987). Thus, rule 408 does not provide a compelling reason to withhold information from the public. Because the district failed to comply with the procedural requirements of the Act as to its argument under rule 408, the district has waived its claim under rule 408 and may not withhold the information at issue on that basis. However, we will consider the applicability of your timely raised exception to disclosure.

Section 552.107(1) of the Government Code, 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* Open Records Decision No. 676 at 6-7 (2002). 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

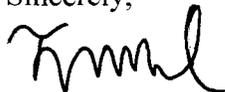
in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *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 contend the submitted information consists of communications between the district, district representatives, and the district's legal counsel for the purpose of providing professional legal services and guidance to the district. You also state the submitted information was not intended to be disclosed to third persons, and the district has not waived this privilege. Based on your representations and our review, we find the district may withhold the information you have marked Exhibit A-1 under section 552.107(1) of the Government Code. However, we find Exhibit A-2 consists of a communication between the district's legal counsel and the county during settlement negotiations when the district's and county's interests were adverse. Accordingly, we find you have failed to demonstrate Exhibit A-2 consists of privileged attorney-client communications, and this information may not be withheld on that basis. As you raise no further exceptions to disclosure, the district must release Exhibit A-2.

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, 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/bhf

Ref: ID# 537684

Enc. Submitted documents

c: Requestor
(w/o enclosures)