



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 19, 2016

Mr. Philip S. Haag
General Counsel for the Johnson Ranch Municipal Utility District
McGinnis Lochridge, L.L.P.
600 Congress Avenue, Suite 2100
Austin, Texas 78701

OR2016-23548

Dear Mr. Haag:

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# 631019.

The Johnson Ranch Municipal Utility District (the "district"), which you represent, received a request for all communications related to a specific lawsuit. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the information we have marked is not responsive to the instant request for information because it was created after the district received the request for information. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). Exhibit B contains public court records that are subject to subsection 552.022(a)(17), which must be released unless they are made confidential under the Act or other law. *See id.* The district seeks to withhold the information at issue under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary in nature and do not make information confidential under the Act. *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. 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, which we have marked, under section 552.103 or section 552.107 of the Government Code. 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 the information subject to section 552.022. We will also address the district's arguments against disclosure of the remaining information.

Texas Rule of Evidence 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 to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a

pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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).

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. 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. *See id.* 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, orig. proceeding).

You assert the information subject to section 552.022(a)(17) consists of privileged attorney-client communications. You explain the information, which consists of e-mail attachments, was communicated between and among attorneys for the district, district representatives in their capacities as clients, attorneys for DH/JB Development, LLC ("DH/JB"), and DH/JB representatives. You also explain DH/JB is a privileged party with respect to these communications. You state the information was communicated for the purpose of the rendition of legal services to the district. However, upon review, we note the public court records were sent to the district by non-privileged parties. Accordingly, the district may not withhold the public court records on that basis.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The district states the information at issue relates to lawsuits styled *Johnson Ranch Mun. Util. Dist. v. Lux Graham*, Cause No. C2014-0438B in the 207th Judicial District Court of Comal County, Texas; and *Johnson Ranch Mun. Util. Dist. v. Graham*, Cause No. 2015-CVB-0054, in the County Court of Law of Comal County, Texas; which were pending when it received the request for information. Therefore, we agree litigation was pending when the district received the request. We also find the district has established the submitted information is related to the above mentioned pending litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the information at issue.

However, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a). We note the opposing parties to the pending litigation have seen or had access to some of the submitted information. Therefore, the district may not withhold this information under section 552.103(a). However, we agree the district may withhold the information we have marked under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

Next, we address your argument under section 552.107 of the Government Code for 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. The elements of the privilege under section 552.107 are the same as those 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. 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).

The district states the information at issue consists of communications involving district attorneys and other district employees and officials. The district also explains some of the communications at issue are between district attorneys and DH/JB attorneys. The district states the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Therefore, the district may generally withhold the information at issue under section 552.107(1) of the Government Code. However, we note some of the information at issue consists of e-mails or attachments received from or sent to non-privileged parties that are located within otherwise privileged e-mail strings. Furthermore, if these e-mails and attachments are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, to the extent the district maintains these non-privileged e-mails and attachments, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

In summary, the district must release the information we marked pursuant to section 552.022 of the Government Code. The district may withhold the information we have marked under section 552.103 of the Government Code. The district may generally withhold the remaining information under section 552.107(1) of the Government Code; however, the district must release the non-privileged e-mails and attachments we have marked if the district maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. The district must release the remaining 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.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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/eb

Ref: ID# 631019

Enc. Submitted documents

c: Requestor
(w/o enclosures)