



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 7, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-06582

Dear Ms. Parker:

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# 559009.

The Texas Department of Transportation (the "department") received a request for communications between the department and named agencies and any information, data, or documents related to the Corpus Christi US 181 Harbor Bridge Project. You claim the submitted information is excepted from disclosure under section 552.107 and privileged under Texas Rule of Evidence 503.¹ You also state the release of the submitted information may implicate the interests of the Federal Highway Administration (the "FHWA"). *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released). We have received comments from the FHWA. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the department failed to request a ruling or submit the responsive information within the statutory time periods prescribed by section 552.301

¹Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass other exceptions found in the Act or discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

of the Government Code. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although you claim the requested information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503, section 552.107 is a discretionary exception that protects a governmental body's interests and may be waived, and Texas Rule of Evidence 503 is a privilege that may be waived also. *See* Open Records Decision No. 676 at 12 (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, in failing to comply with section 552.301, the department has waived its claims under section 552.107 and Texas Rule of Evidence 503. However, because third party interests can provide compelling reasons for non-disclosure under section 552.302, we will address FHWA's arguments. *See* ORD 676; *see also* Open Records Decision No. 150 (1977).

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 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, the FHWA 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, orig. proceeding).

The FHWA asserts the submitted information constitutes privileged attorney-client communications between FHWA attorneys, FHWA employees, department attorneys, and department employees. The FHWA explains it is working together with the department as joint lead agencies in preparation of an environmental impact statement for the Harbor Bridge Project as required by the National Environmental Policy Act. *See* 23 U.S.C. § 139(c)(2). The FHWA states the communications were made for the purpose of facilitating the rendition of professional legal services to the clients and these communications have remained confidential. Upon review, we find the FHWA has demonstrated the applicability of the attorney-client privilege to the submitted information. Thus, the department may withhold the submitted information under Texas Rule of Evidence 503 on behalf of the FHWA.²

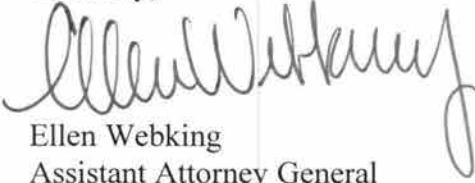
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

² As our ruling is dispositive, we need not address FHWA’s remaining argument.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ellen Webking".

Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID# 559009

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Hazem Isawi
Attorney Advisor
Federal Highway Administration
4749 Lincoln Mall Road, Suite 600
Matteson, Illinois 60443
(w/o enclosures)