



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2017

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2017-02653

Dear Ms. Jimenez:

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# 644525.

The Nueces County Attorney's Office (the "county attorney's office") received a request for three categories of information pertaining to a specified project. You state you do not have information responsive to the first and third categories of the request.¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, 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:

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

...

(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 information we have marked consists of an executed contract relating to the expenditure of funds by a governmental body subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. Although you raise section 552.107 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* 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) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(3), which we have marked, may be withheld under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Further, we will consider your argument under section 552.107 for the information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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 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. 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).

We note the information subject to section 552.022(a)(3) is an attachment to an e-mail communication between Nueces County (the “county”) attorneys, county employees, and county officials that was made in furtherance of the rendition of professional legal services to the county. You state the e-mail communication was intended to be confidential and was not disclosed to non-privileged parties. Upon review, we find you have demonstrated the attachment is part of a privileged e-mail communication for purposes of rule 503 of the Texas Rules of Evidence. Thus, the county attorney’s office may generally withhold the attachment under rule 503 of the Texas Rules of Evidence. However, we note the attachment reflects it was shared with a party you have failed to demonstrate is privileged. Furthermore, if the attachment is removed from the privileged e-mail communication and stands alone, it is responsive to the request for information. Therefore, if the attachment, which we have marked, is maintained by the county attorney’s office separate and apart from the otherwise privileged e-mail communication to which it is attached, then the county attorney’s office may not withhold the attachment under rule 503. However, if the attachment is not maintained separate and apart from the otherwise privileged e-mail communication, then the county attorney’s office may withhold it under rule 503 of the Texas Rules of Evidence.

The county attorney’s office claims section 552.107 of the Government Code for the submitted information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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. *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. *See Huie*, 922 S.W.2d at 923.

You state the information at issue consists of communications between county attorneys, county employees, and county officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the county and these communications have remained confidential. Upon review, we find the county attorney's office has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Therefore, with the exception of the information we marked for release, the county attorney's office may generally withhold the information at issue under section 552.107(1) of the Government Code. However, the remaining information was sent to individuals you have not demonstrated are privileged parties. Thus, we find you have not demonstrated the information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the county attorney's office may not withhold this information, which we have marked for release, under section 552.107(1).

Additionally, we note some of the otherwise privileged e-mail strings include e-mails received from or sent to a non-privileged party. Furthermore, if those e-mails are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the county attorney's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the county attorney's office may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code.

In summary, if the information subject to section 552.022(a)(3) of the Government Code, which we have marked, is maintained by the county attorney's office separate and apart from the otherwise privileged e-mail communication to which it is attached, then the county attorney's office may not withhold this information under rule 503 of the Texas Rules of Evidence. However, if the information subject to section 552.022(a)(3) is not maintained separate and apart from the otherwise privileged e-mail communication, then the county attorney's office may withhold it under rule 503 of the Texas Rules of Evidence. With the exception of the information we marked for release, the county attorney's office may generally withhold the information not subject to section 552.022 under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the county attorney's office separate and apart from the otherwise privileged e-mail strings in which they appear, they must be released. The county attorney's office 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,

A handwritten signature in black ink, appearing to read 'MLC', followed by a long, sweeping horizontal line that extends to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 644525

Enc. Submitted documents

c: Requestor
(w/o enclosures)