



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2017

Mr. Fernando C. Gomez
Vice Chancellor and General Counsel
The Texas State University System
208 East 10th Street, Suite 600
Austin, Texas 78701-2407

OR2017-03952

Dear Mr. Gomez:

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# 646715.

Lamar University (the "university") received a request for all records, documents, letters, e-mails, memoranda, and reports pertaining to a specified investigation. You claim the submitted information is excepted from disclosure under section 552.107(1) of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹ Although you cite to rule 1.05 of the Texas Disciplinary Rules of Professional Responsibility, we note it is proper to raise section 552.107 of the Government Code and Texas Rule of Evidence 503 for the attorney-client privilege. Further, we note, and you acknowledge, the university failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See Gov't Code* § 552.301(b), (e). Nonetheless, because the attorney-client privilege is a compelling reason to overcome the presumption of openness, we will consider the applicability of section 552.107(1) and Texas Rule of Evidence 503 to the submitted information. *See id.* § 552.302; *see also Paxton v. City of Dallas*, No. 15-0073 2017 WL 469597 (Tex. Feb. 3, 2017). Additionally, although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).*

² We 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.

We note some of the submitted information is part of a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). You raise section 552.107 of the Government Code for this information. However, section 552.107 does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (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). Accordingly, the university may not withhold the information at issue under section 552.107 of the Government Code. Nevertheless, 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 (Tex. 2001). Therefore, we will consider the applicability of rule 503 to the information subject to section 552.022(a)(1). Additionally, we will consider your argument under section 552.107(1) for the information not subject to section 552.022(a)(1).

Texas Rule of Evidence 503(b)(1) provides:

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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503, provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the information subject to section 552.022(a)(1) consists of privileged attorney-client communications. You explain the information at issue was communicated between university employees and legal counsel for the university for the purpose of facilitating the rendition of professional legal services to the university. You state the information at issue was intended to be confidential and was not disclosed to non-privileged parties. Based on your representations and our review, we find the information subject to section 552.022(a)(1) consists of communications protected by the attorney-client privilege. Accordingly, the university may withhold the information subject to section 552.022(a)(1) of the Government Code under Texas Rule of Evidence 503.

Next, we address your argument against disclosure of the remaining information, which is 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(1) are the same as those discussed above 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).

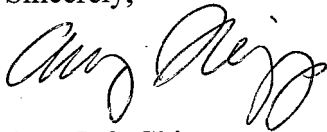
You state the remaining information consists of communications involving university employees and legal counsel for the university. You state these communications were made in furtherance of the rendition of professional legal services to the university. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the university may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the university may withhold the information subject to section 552.022(a)(1) of the Government Code under Texas Rule of Evidence 503. The university 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, 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/sdk

Ref: ID# 646715

Enc. Submitted documents

c: Requestor
(w/o enclosures)