



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 18, 2017

Ms. Leticia D. McGowan  
Assistant General Counsel  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2017-08154

Dear Ms. McGowan:

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# 651790.

The Dallas Independent School District (the "district") received two requests from the same requestor for all records pertaining to a specified investigation and any fee bills from two specified law firms related to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note portions of the submitted information are 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:

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<sup>1</sup>Although the district asserts section 552.101 of the Government Code and the attorney work product privilege, it makes no arguments concerning these claims as required by section 552.301 of the Government Code. See Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address section 552.101 or the attorney work product privilege.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1), (16). The submitted information includes a completed investigation and completed evaluations which are subject to section 552.022(a)(1). The district must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Portions of the submitted information also consist of information that is in a bill for attorney's fees subject to section 552.022(a)(16). The information subject to section 552.022(a)(16) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(16). Although you raise sections 552.103 and 552.107 of the Government Code for the submitted information, these sections are discretionary exceptions to disclosure. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 676 at 10-11 (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 sections 552.022(a)(1) and 552.022(a)(16), which we have marked, may be withheld under section 552.103 or 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 arguments under sections 552.103 and 552.107 for the information not subject to section 552.022.

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

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).

The district states the information subject to section 552.022(a)(1) was communicated between attorneys for the district and employees of the district in their capacities as clients and client representatives. The district asserts the information was created in furtherance of the rendition of professional legal services to the district. The district represents the information at issue was not intended for release to third parties and the confidentiality of the information has been maintained.

Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to some of the information subject to section 552.022(a)(1). *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold the completed investigation, which we have marked, under rule 503 of the Texas Rules of Evidence.

The completed evaluations, which are also subject to section 552.022(a)(1), were obtained from the requestor, a non-privileged party, and are attached to otherwise privileged e-mail strings. Upon review, we find the evaluations are separately responsive to the request and exist separate and apart from the otherwise privileged communication to which they are attached. Thus, we find the district has not demonstrated this information, standing alone, is a privileged attorney-client communication. Therefore, we find the district may not withhold the completed evaluations under rule 503 of the Texas Rules of Evidence.

Next, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). Accordingly, the district may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503. Upon review, we find the district has established the information we have marked within the attorney fee bills constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked within the attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

However, we find the district has failed to demonstrate the remainder of the fee bills consists of privileged attorney-client communications. We note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, no portion of the remainder of the fee bills may be withheld under rule 503.

The district claims section 552.107 of the Government Code for the remaining information not subject to section 552.022. 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.

The district states the remaining information was communicated between attorneys for the district and employees of the district in their capacities as clients and client representatives. The district asserts the information was created in furtherance of the rendition of professional legal services to the district. The district represents the information at issue was not intended for release to third parties and the confidentiality of the information has been maintained.

Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to some of the remaining information. We note, however, two of the communications the district seeks to withhold were received from the requestor, a party whose interests were adverse to the district at the time of the communications. Accordingly, the communications with a non-privileged party do not consist of privileged attorney-client communications and the district may not withhold them under section 552.107(1). We further note the privileged e-mail strings include attachments received from the requestor, a non-privileged party. If the attachments received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Because the district maintains these non-privileged attachments separate and apart from the otherwise privileged e-mails to which they are attached, the district may not withhold these non-privileged attachments under section 552.107(1). Therefore, the district may withhold only the information we have marked under section 552.107(1) of the Government Code.

You assert the remaining information is excepted from public disclosure under section 552.103 of the Government Code, which provides in relevant part 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). The 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note the remaining information was provided to the district by the requestor. Therefore, the opposing party has seen the information at issue. Accordingly, the district may not withhold the remaining information under section 552.103 of the Government Code.

In summary, the district may withhold the completed investigation we have marked and the information we have marked within the attorney fee bills under rule 503 of the Texas Rules of Evidence. The district may withhold the information we have marked under section 552.107(1) of the Government Code. 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](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/sb

Ref: ID# 651790

Enc. Submitted documents

c: Requestor  
(w/o enclosures)