



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 27, 2018

Mr. S. Anthony Safi
Counsel for the El Paso Independent School District
Mounce, Green, Myers, Safi, Paxson & Galatzan, PC
P.O. Box 1977
El Paso, Texas 79999-1977

OR2018-04508

Dear Mr. Safi:

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# 698066 (ORR Nos. W000754, W000756, & W000814).

The El Paso Independent School District (the "district"), which you represent, received three requests from two different requestors seeking communications to or from several named district officials related to a named individual or a specified organization.¹ The district states it will release some of the requested information. The district claims the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions the district claims and reviewed the submitted representative sample of information.²

¹The district states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

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:

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

Gov't Code § 552.022(a)(1). The submitted information includes a completed report that is subject to section 552.022(a)(1). The district must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The district seeks to withhold the information at issue under sections 552.107(1) and 552.111 of the Government Code. However, section 552.107(1) and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold any portion of the completed report under section 552.107(1) or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address the district’s claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the district’s claim of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the completed report. We will also consider the district’s arguments under sections 552.107(1) and 552.111 of the Government Code for the information not subject to section 552.022.

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).

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).

The district states the completed report consists of a privileged attorney-client communication between the district's attorneys and district officials and staff in their capacities as clients. The district explains the information was communicated for the purpose of the rendition of legal services to the district. The district states the information has not been, and was not intended to be, disclosed to third parties. Based on these representations and our review of the information at issue, we find the district has established the information subject to section 552.022(a)(1) of the Government Code constitutes a privileged attorney-client communication under rule 503. Thus, the district may withhold the information at issue pursuant to rule 503 of the Texas Rules of Evidence.³

The district claims section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same

³As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

as those discussed 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* Open Records Decision No. 676 at 6-7 (2002). 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 informs us the remaining information consists of communications between the district's attorneys and district officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the district. The district states the communications were intended to be confidential. Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may generally withhold the remaining information under section 552.107 of the Government Code.⁴ We note, however, some of these e-mail strings include e-mails received from the named individual, who the district has not demonstrated is a privileged party. Furthermore, if the e-mails received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code.

We note the non-privileged e-mails contain an e-mail address that is subject to section 552.137 of the Government Code.⁵ Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address at issue under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the district may withhold the information subject to section 552.022(a)(1) of the Government Code under Texas Rule of Evidence 503. The district may generally withhold the remaining information under section 552.107 of the Government Code; however, if the non-privileged e-mails are maintained by the district separate and apart from the otherwise

⁴As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

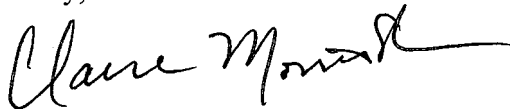
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. In releasing any non-privileged e-mails, the district must withhold the personal e-mail address under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 698066

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)