



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 12, 2019

Ms. Elizabeth Nelson
Counsel for the DeSoto Independent School District
Walsh, Gallegos, Trevino, Russo, & Kyle, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2019-18978

Dear Ms. Nelson:

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# 775021.

The DeSoto Independent School District (the "district"), which you represent, received a request for information pertaining to a specified vote by the district's board. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, you state the district sought clarification from the requestor for part of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v.*

¹Although you also raise section 552.101 of the Government Code, you provide no arguments explaining how this exception applies to the submitted information. Therefore, we assume you no longer assert this exception. *See* Gov't Code §§ 552.301, .302.

²We 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.

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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You inform us the district has yet to receive a response to the request for clarification. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this instance, the district has submitted information it believes is responsive to the request and made arguments against disclosure of this information. Thus, we assume the district has made a good-faith effort to relate the request to information it holds. However, the district has no obligation at this time to release any additional responsive information for which it has not received clarification. If the requestor responds to the request for clarification, the district must seek a ruling from this office before withholding any additional responsive information from the requestor. See Gov't Code § 552.222(b); *City of Dallas*, 304 S.W.3d at 387.

Next, we note the requestor asks the district to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. ORD 561 at 8-9, 555 at 102. We assume the city has made a good-faith effort to do so.

Next, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2018-16878 (2018). In that ruling, we determined the district may withhold the requested information under Texas Rule of Evidence 503. You state the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the district may continue to rely on Open Records Letter No. 2018-16878 as a previous determination and withhold the information at issue in accordance with that ruling. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the 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). We note the submitted information is part of a completed investigation subject to section 552.022(a)(1). The district must release the submitted responsive information pursuant 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. Although you seek to withhold this information under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold this information under section 552.107 of the Government Code. 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). Therefore, we will consider your argument under Texas Rule of Evidence 503 for the submitted information.

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).

You assert the submitted information consists of a communication between attorneys for the district, district employees, and district officials made for the purpose of facilitating the rendition of professional legal services to the district. You state this communication was intended to be and has remained confidential. Upon review, we find you established the submitted information is a privileged attorney-client communication under rule 503. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 238 (Tex. App.-Austin 2000, pet. denied)(concluding attorney’s entire investigation 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). Thus, to the extent the requested information is not identical to the information previously requested and ruled upon in Open Records Letter No. 2018-16878, the district may withhold the submitted information under Texas Rule of Evidence 503.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the district may continue to rely on Open Records Letter No. 2018-16878 as a previous determination and withhold the information at issue in accordance with that ruling. To the extent the requested information is not identical to the information previously requested and ruled upon in Open Records Letter No. 2018-16878, the district may withhold the submitted information under Texas Rule of Evidence 503.

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 "Patrick P. Mehaffy", with a stylized flourish at the end.

Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/gw

Ref: ID# 775021

Enc. Submitted documents

c: Requestor
(w/o enclosures)