



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 23, 2019

Ms. Ellie Bane
Chief Legal Counsel
Ector County Hospital District d/b/a Medical Center Health System
P.O. Box 7239
Odessa, Texas 79760

OR2019-23621

Dear Ms. Bane:

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# 782188.

The Ector County Hospital District (the "district") received a request for information pertaining to the hiring of the law firm Walsh Gallegos Trevino & Kyle, PC ("Walsh"), including fee bills. The district states it has released some of the requested information, but claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and rule 192.5 of the Texas Rules of Civil Procedure. The district also states, and provides documentation showing, it notified Walsh of the district's receipt of the request for information and of Walsh's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from Walsh objecting to the release of some of the information at issue. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the procedural obligations of the district under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision

from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). The district informs us it received the request for information on May 23, 2019, and was closed for business on May 27, 2019. Thus, the district's ten-business-day deadline to request a ruling was June 7, 2019. However, the envelope in which the district provided the information required by section 552.301(b) has three postmarks: the first dated June 6, 2019; the second dated June 12, 2019; and the third dated June 14, 2019. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Because two of the postmarks are dated after the 10-business-day deadline prescribed by section 552.301(b), we are unable to determine whether the district timely requested a ruling. Accordingly, we conclude the district failed to comply with the procedural requirements mandated by section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Because section 552.107 of the Government Code, Texas Rule of Evidence 503, and third-party interests can provide compelling reasons to overcome the presumption of openness, we will address whether the information at issue is excepted from release on those grounds. However, we find the district has failed to establish a compelling reason to address its remaining argument.

Next, we note the submitted information contains agreements and attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant the following:

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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [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)(3), (16). Section 552.107 of the Government Code section is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 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 purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). In addition, information encompassed by section 552.022 may be withheld under section 552.104. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Accordingly, we will consider the applicability of Texas Rule of Evidence 503 and section 552.104 of the Government Code to this 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* Open Records Decision No. 676 (2002). 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 asserts some of the information at issue consists of confidential communications between attorneys for and employees of the district that were made for the purpose of rendering professional legal advice. It also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to some of this information, which we have marked. Therefore, the district may withhold the information we have marked under Texas Rule of Evidence 503.¹ However, we find the district has failed to demonstrate the remaining information at issue 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 the district has failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, the district may not withhold any portion of the remaining information under rule 503.

Section 552.107(1) also protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same 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* 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*, 922 S.W.2d at 923.

The district asserts the remaining information consists of confidential communications between attorneys and employees of the district that were made in furtherance of the rendition of professional legal services. The district also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the

¹As our ruling is dispositive, we do not address the other arguments to withhold this information.


remaining information. Thus, the district may withhold the remaining information under section 552.107(1) of the Government Code.²

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503, but must release the remaining information we have marked under section 552.022(a)(16) of the Government Code. The district 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/mo

Ref: ID# 782188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we do not address the other arguments to withhold this information.