



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 11, 2019

Ms. Elizabeth Stevens  
Assistant General Counsel  
Harris County  
500 Jefferson Street, Suite 600  
Houston, Texas 77002

OR2019-28728

Dear Ms. Stevens:

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# 789635.

The Harris County District Attorney's Office (the "district attorney's office") received a request for all e-mails between a named individual and the district attorney's office. You claim some of the submitted information is not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, you argue the information submitted as Exhibit E consists of information that is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

(a) . . . information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

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<sup>1</sup> Although the district attorney's office also raises 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).

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertain to official business of the governmental body.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a).

You assert Exhibit E consists of communications that relate to personal matters of a district attorney's office employee, and you indicate this information does not constitute public information since the nature of these communications do not pertain to the transaction of official business of the district attorney's office. Further, you indicate the use of district attorney's office resources to create the information at issue was *de minimis*. Based upon your representations and our review, we find Exhibit E does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district attorney's office. *See id.* § 552.002. Therefore, we conclude this information does not constitute

public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 7 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Accordingly, the district attorney's office is not required to release Exhibit E in response to this request for information.

Next, we note some of the submitted information in Exhibit C-2 is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, as follows:

(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 information at issue consists of a completed report subject to section 552.022(a)(1) that must be released 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.* Although you assert the information at issue is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the submitted information may be withheld under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure 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 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information at issue. Additionally, we will consider your arguments for the information not subject to section 552.022.

Next, we address your assertion of Texas Rule of Evidence 503 for the information subject to section 552.022 of the Government Code. 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 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. *See* ORD 676. 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 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.] 1988, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the information in Exhibit C-2 subject to section 552.022 of the Government Code consists of an investigative report created on behalf of the district attorney's office regarding legal employment issues. The district attorney's office informs us the investigative report was prepared and provided to the district attorney's office to facilitate the rendition of professional legal services to the district attorney's office. Further, the district attorney's office states the information at issue was intended to be and has remained confidential. Based upon the district attorney's office's representations and our review, we find the district attorney's office has demonstrated the applicability of the attorney-client privilege to the information at issue. *Cf. 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 attorney's office may withhold the report subject to section 552.022(a)(1) of the Government Code in Exhibit C-2 under rule 503 of the Texas Rules of Evidence.<sup>2</sup>

The district attorney's office claims section 552.107 of the Government Code for the remaining information. 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.

You state the remaining information consists of communications between an attorney retained by the district attorney's office and employees of the district attorney's office. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district attorney's office. You further state the communications were intended to be and have remained confidential. Based upon your representations and our review, we find the information at issue consists of privileged attorney-client communications. Accordingly, the district attorney's office may withhold the remaining information not subject to section 552.022(a)(1) of the Government Code under section 552.107(1) of the Government Code.<sup>3</sup>

In summary, Exhibit 3 is not subject to the Act, and the district attorney's office is not required to release Exhibit 3 in response to this request for information. The district attorney's office may withhold the report subject to section 552.022(a)(1) of the Government Code in Exhibit C-2 under rule 503 of the Texas Rules of Evidence. The district attorney's office may withhold the remaining information not subject to section 552.022(a)(1) of the Government Code 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

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure for this information.

<sup>3</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure for this information.

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,

A handwritten signature in black ink that reads "Kimbell Kesling". The signature is written in a cursive style with a large, sweeping flourish at the end.

Kimbell Kesling  
Attorney  
Open Records Division

KK/eb

Ref: ID# 789635

Enc. Submitted documents

c: Requestor  
(w/o enclosures)