



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 30, 2019

Mr. Scott W. Eidman  
Counsel for the Frisco West Water Control and Improvement District of Denton County  
Winstead PC  
2728 North Harwood Street, Suite 500  
Dallas, Texas 75201

OR2019-30637

Dear Mr. Eidman:

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# 794400.

The Frisco West Water Control and Improvement District of Denton County (the "district"), which you represent, received a request for e-mail correspondence between district board members and named companies involving specified contracts and bids. You state you have released some information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

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, the following:

- (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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). A portion of the submitted information consists of information in an account, voucher, or contract relating to the expenditure of funds by a governmental body, which is subject to section 552.022(a)(3). *Id.* Thus, the district must release this information unless it is made confidential under the Act or other law. *See id.* Although the district seeks to withhold the information at issue under section 552.107 of the Government Code, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Accordingly, the district may not withhold the information at issue pursuant to section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for purposes of section 552.022(a). *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will consider the district's assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the submitted information subject to section 552.022(a)(3). We will also consider the district's argument under section 552.107 of the Government Code for the remaining information.

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 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 state the information subject to section 552.022(a)(3) consists of an attachment to a communication between attorneys for the district and district employees that was made for the purpose of facilitating the rendition of legal services to the district. You state the communication was intended to be, and has remained, confidential. Based on your representations and our review, we find you have demonstrated the information at issue is a privileged attorney-client communication. Thus, the district may withhold the information we marked pursuant to rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 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.

You assert the remaining information constitutes communications between district employees and outside legal counsel for the district that were made for the purpose of providing legal advice to the district. You also assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Thus, the district may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the district may withhold the information we marked pursuant to rule 503 of the Texas Rules of Evidence. 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,

A handwritten signature in black ink, appearing to read "D. Michelle Case", with a stylized flourish at the end.

D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMC/rm

Ref: ID# 794400

Enc. Submitted documents

c: Requestor  
(w/o enclosures)