



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 7, 2020

Mr. Jaron L. Hudgins
Counsel for the Walker County Hospital District
Beatty, Navarre & Strama, P.C.
901 South Mopac Expressway, Building 1, Suite 200
Austin, Texas 78746

OR2019-35236A

Dear Mr. Hudgins:

This office issued Open Records Letter No. 2019-35236 (2019) on December 12, 2019. Since that date, we have received new information that affects the facts on which this ruling was based. We have examined this ruling and determined we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on December 12, 2019. Your request was assigned ID# 813919.

The Walker County Hospital District (the "district"), which you represent, received a request for bank statements and attorney fee bills during a specified time period. You state the district has released some information to the requestor with redactions. Additionally, you state the district has released some information pursuant to Open Records Letter Nos. 2018-12141A (2018) and 2018-29132 (2019).¹ We understand the district will withhold certain information pursuant to section 552.136(c) of the Government Code.² You

¹ *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

² Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code

claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.³ We have considered the submitted arguments and reviewed the submitted information.

Initially, as you acknowledge, the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege[.]” unless the information is made confidential under the Act or other law. *Id.* § 552.022(a)(16). Although you seek to withhold the information at issue under section 552.107 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (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).* Therefore, the district may not withhold any of the submitted information, which is subject to section 552.022, 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. *See 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 for the information at issue. Additionally, as information subject to section 552.022 of the Government Code may be withheld under section 552.104 of the Government Code and because section 552.137 of the Government Code makes information confidential under the Act, we will consider the applicability of these exceptions to the information at issue.⁴

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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;

§ 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

³ Although you also raise section 552.022 of the Government Code, we note this section is not an exception to disclosure. *See Gov’t Code* § 552.022. Additionally, although you raise section 552.101 of the Government Code and Texas Rule of Civil Procedure 192.5, you make no arguments to support this exception and this privilege. Therefore, we assume you have withdrawn your claim this section and this privilege apply to the information at issue. *See id.* §§ 552.301, .302.

⁴ The 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).*

(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).

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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You state the information you marked consists of privileged attorney-client communications between attorneys for the district, attorney representatives, and district employees and officials in their capacities as clients that were made for the purpose of facilitating legal counsel to the district. You also state these communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find you demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, with the exception of the information we marked for release, the district may withhold the information you marked under rule 503 of the Texas Rules of Evidence. However, the remaining information at issue either does not document communications for purposes of rule 503 or documents communications with non-privileged parties. We note an entry stating a memorandum or e-mail was prepared, drafted, or reviewed does not demonstrate the document was communicated to the client. Thus, we find you failed to demonstrate the applicability of the attorney-client privilege to

the information we marked for release. Therefore, the district may not withhold the information we marked for release on the basis of the attorney-client privilege in rule 503 of the Texas Rules of Evidence.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You represent the information you marked pertains to an ongoing competitive bidding situation in which the district is “evaluating options to continue the operation of the Huntsville Memorial Hospital[.]” You explain the district “currently leases the operation of the hospital . . . and has been engaged in confidential negotiations with private healthcare operators[.]” You assert release of the information at issue would “identify various competitors and bidders [and] . . . disadvantage the [d]istrict by giving an advantage to potential competitors and bidders[.]” After review of the information at issue and consideration of the arguments, we find the district has established the release of the information you marked would give advantage to a competitor or bidder. Accordingly, we conclude the district may withhold the information you marked under section 552.104(a) of the Government Code.

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). Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Accordingly, the district must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

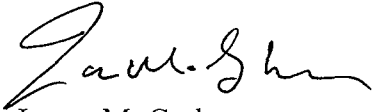
In summary, with the exception of the information we marked for release, the district may withhold the information you marked under rule 503 of the Texas Rules of Evidence. The district may withhold the information you marked under section 552.104(a) of the Government Code. The district must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The district must release the remaining information.

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 "James M. Graham". The signature is fluid and cursive, with a long horizontal stroke at the end.

James M. Graham
Assistant Attorney General
Open Records Division

JMG/eb

Ref: ID# 813919

Enc. Submitted documents

c: Requestor
(w/o enclosures)