



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2019

Mr. Justin S. Light
Counsel for Tarrant Regional Water District
Pope, Hardwicke, Christie, Shell, Kelly & Taplett, L.L.P.
500 West 7th Street, Suite 600
Fort Worth, Texas 76102

OR2019-35618

Dear Mr. Light:

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# 803321.

The Tarrant County Regional Water District (the "district"), which you represent, received a request for legal fees and e-mail communications related to a specified project. You state the district released some information. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code, as well as privileged pursuant to rule 503 of the Texas Rules of Evidence. You also state release of this information may implicate the proprietary interests of the Department of the Army, Corps of Engineers (the "department"). Accordingly, you state, and provide documentation showing, you notified the department of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the department. We have considered the submitted arguments and reviewed the submitted information, some of which consists of a representative sample.¹

¹ We assume 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

Initially, we note some of 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 confidential under the Act or other law. *Id.* § 552.022(a)(16). You seek to withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, section 552.107 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 information at issue may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence is “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(16) 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.

letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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).

The district asserts portions of the submitted fee bills, which it marked, include privileged attorney client communications between privileged parties. The district states the communications at issue were made for the purpose of the rendition of legal services to the district. The district states the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on these representations and our review, we find the district has established some of the information at issue constitutes attorney client communications under rule 503. Thus, the district may withhold the information we marked within the information at issue pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate the remaining information at issue reveals a communication with a party the district has identified as privileged or otherwise consists of privileged attorney client communications. Thus, we find the district has failed to demonstrate the remaining information at issue consists of privileged attorney client communications. Accordingly, no portion of the remaining information at issue may be withheld under rule 503.

Section 552.104(a) of the Government Code exempts 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 (Tex. 2015). You represent some of the remaining information pertains to a competitive bidding situation. You explain the district “is competing at a federal level for allocation of funds in the federal government’s budget for funding for the [project at issue].” You assert release of the information would allow the competing federal projects to have a competitive advantage over the district. After

reviewing the submitted information and considering your arguments, we find the district has established the release of the submitted information would give advantage to a competitor or bidder. Accordingly, we conclude the district may withhold the information you indicated under section 552.104(a) of the Government Code.²

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.³ Gov't Code § 552.1175. Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Upon review, we find the information we marked consists of personal information of individuals who may be among the types of individuals listed in section 552.1175(a). Thus, if the information we marked under section 552.1175 relates to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the district must withhold the marked information under section 552.1175 of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service.

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 information you indicated under section 552.104(a) of the Government Code. If the information we marked under section 552.1175 relates to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the district must withhold the marked information under section 552.1175 of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. 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.

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³ 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).

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 'Jahna Ward', with a stylized flourish at the end.

Jahna Ward
Assistant Attorney General
Open Records Division

JW/jxd

Ref: ID# 803321

Enc. Submitted documents

c: Requestor
(w/o enclosures)