



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 1, 2022

Mr. Kirk A. Agee
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OR2022-19103

Dear Mr. Agee:

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# 957158.

The Eanes Independent School District (the "district"), which you represent, received a request for specified contracts and communications during a stated time period. You state you are redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also state you have released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.² We

¹ The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

² Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege in this instance is section 552.111 of the Government Code. *See* Open Records Decision No. 677 (2002). Further, although you also raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note, and you acknowledge, 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 expressly confidential under the Act or other law. Gov’t Code § 552.022(a)(16). The district seeks to withhold portions of the submitted attorney fee bills 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 district may not withhold any portion of the submitted attorney fee bills under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Further, as section 552.136 of the Government Code makes information confidential under the Act, we will consider its applicability to the information at issue. We will also consider your arguments under sections 552.107 and 552.111 of the Government Code for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides as follows:

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

³ 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 letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it 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. 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).

The district asserts portions of the submitted fee bills include privileged attorney-client communications between outside counsel for the district and district officials and employees that were made in furtherance of the rendition of professional legal services to the district. The district states these communications were intended to be, and have remained, confidential. Based upon these representations and our review, we find the district has established some of the information at issue constitutes attorney-client communications under rule 503. Accordingly, with the exception of the information we marked for release, the district may withhold the information you marked pursuant to rule 503 of the Texas Rules of Evidence. However, we find the information we marked for release does not document a communication with a privileged party. We note an entry stating a memorandum or e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, the district may not withhold any portion of the information we marked for release under rule 503.

The district claims section 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information that comes 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 v. DeShazo*, 922 S.W.2d at 923.

You assert the information not subject to section 552.022 of the Government Code consists of communications between outside counsel for the district and district officials and employees that were made for the purpose of providing legal services to the district. You

state these communications were intended to be, and have remained, confidential. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the information not subject to section 552.022(a)(16) of the Government Code under section 552.107(1) of the Government Code.⁴

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the district must withhold the bank account and routing numbers you marked under section 552.136 of the Government Code. However, we find you have failed to demonstrate the remaining information you marked consists of an access device number for purposes of section 552.136. Therefore, the district may not withhold the remaining information you marked under section 552.136 of the Government Code.

In summary, with the exception of the information we marked for release, the district may withhold the information you marked pursuant to rule 503 of the Texas Rules of Evidence. The district may withhold the information not subject to section 552.022(a)(16) of the Government Code under section 552.107(1) of the Government Code. The district must withhold the bank account and routing numbers you marked under section 552.136 of the Government Code. 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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/jm

⁴ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Ref: ID# 957158

Enc. Submitted documents

c: Requestor
(w/o enclosures)