



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

May 7, 2003

Ms. Lisa B. Silvia  
Paralegal  
Fort Worth Independent School District  
100 North University Drive  
Fort Worth, Texas 76107

OR2003-3086

Dear Ms. Silvia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180720.

The Fort Worth Independent School District (the "district") received a request for the addenda to a particular settlement agreement, and certain information related to requests for information previously made by the requestor. You state, and otherwise indicate, that some responsive information has been provided to the requestor. You also indicate that some of the requested information does not exist.<sup>1</sup> You claim that some of the remaining requested information is excepted from disclosure under sections 552.101<sup>2</sup> and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample of information.<sup>3</sup> We have also considered written comments submitted by the requestor. See Gov't Code § 552.304 (providing that member of public

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<sup>1</sup> The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." See Gov't Code § 552.101. We note that the attorney-client privilege is properly raised under section 552.107 of the Government Code, or under Texas Rule of Evidence 503 for information that is made expressly public pursuant to section 552.022 of the Government Code. See Open Records Decision No. 676 at 4 (2002). Thus, we will consider your claim under section 552.101 under section 552.107 of the Government Code.

<sup>3</sup> We assume that the "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.

may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note the requestor's contentions that he did not receive information from the district which he was entitled to receive in response to a previous written request for information, and that certain information exists which the district claims does not exist. The district states that it did, in fact, provide such information to the requestor, and that some information does not exist. Thus, we are faced with a factual dispute between the district and the requestor. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). As we rely on the district's position, we need not further address these issues.

We next note that some of the requested information was the subject of Open Records Letter No. 2002-4737 (2002). Specifically, that ruling encompassed billing statements provided to the district by the law firm of Susman Godfrey L.L.P. from the first billing period to May 31, 1997, from June 1, 1997 to December 31, 2000, and from January 1, 2001 through February 28, 2002. In that ruling, this office found that certain information was excepted from disclosure under Rule 503 of the Texas Rules of Evidence. As there has been no change in the facts, law, or circumstances relating to the information, the district must rely on our decision in Open Records Letter No. 2002-4737 as a previous determination in withholding the information requested in this instance that this office ruled was excepted from disclosure in that decision. *See* Open Records Decision No. 673 (2001).

We now address your claims in relation to the submitted information. We note that attorney fee bills are subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the district may not withhold any of the

submitted information under section 552.107. However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the submitted information is excepted under Rule 503.

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 for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; 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 in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 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* Open Records Decision No. 676 (2002). 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, 4527 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

We note that with the exception of the district itself, you have failed to identify the parties to the communications in the submitted attorney billing statements. Nevertheless, in certain instances, we are able to ascertain the identities of the parties involved. Thus, we have marked those portions of the billing statements which reflect confidential communications made for the purpose of facilitating the rendition of professional legal services to the client pursuant to Rule 503. This information must be withheld under that provision. The remaining information in the submitted fee bills involves communications to or between individuals who we are unable to identify as employees of the district, the district's outside counsel, or representatives of these parties. Accordingly, we are unable to conclude that communications involving such unidentified individuals are protected by the attorney-client privilege, and thus, this information must be released. *See generally* Open Records Decision No. 150 (1977) (stating that Public Information Act places burden on governmental body to establish why and how exception applies to requested information); *see also Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

In summary, you must rely on Open Records Letter No. 2002-4737 (2002) as a previous determination in withholding the information that this office ruled was excepted from disclosure in that decision under Rule of Evidence 503. We have marked the information in the submitted fee bills that must be withheld under Rule 503. The remaining requested information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 180720

Enc. Submitted documents

c: Mr. Homer Max Wiesen  
P.O. Box 857  
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(w/o enclosures)