



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2004

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR2004-6821

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206158.

The Dallas Independent School District (the "district") received a request for "all records reflecting all actions and decision taken by the Legal Review Committee of [the district's] Personnel Department from 1998 to present." The requestor also seeks "all records reflecting petitions, hearings held, and written opinions generated to or for or by the Legal Review Committee." You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, 552.107, 552.114, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted representative sample documents.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

¹ We note that former section 552.131 of the Government Code, "Exception: Certain Information Held by School District," was renumbered as section 552.135 by the Seventy-seventh Legislature, effective September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(54) (codified at Gov't Code § 552.135). The revision was non- substantive.

² We assume that 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.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Portions of the submitted information constitute information that is subject to section 552.022(a)(1) and must be released to the requestor, unless expressly confidential under other law or excepted from disclosure pursuant to section 552.108 of the Government Code. Although the district claims that this section 552.022(a)(1) information is excepted from disclosure pursuant to section 552.107 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Public Information Act (the "Act") that protects a governmental body's interests and may be waived.³ Accordingly, we conclude that the district may not withhold any portion of this section 552.022(a)(1) information under section 552.107 of the Government Code. However, we also note that the Texas Supreme Court has determined 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); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will address whether any portion of this section 552.022(a)(1) information is confidential under rule 503 of the Texas Rules of Evidence.

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;

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" for purposes of section 552.022 of the Government Code.

(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 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 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 information at issue 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); *see also In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also Open Records Decision No. 676 (2002)*.

You state that the requested documents are those that are created by or for the district's Legal Review Committee (the "committee"). You explain that the committee is comprised of top-level district administrators, including the district's Executive Director of Employee Relations and Associate Superintendent of Human Resources, as well as legal counsel. You further explain that the committee was created to give the administrators on the committee the opportunity to receive legal advice from district attorneys on the committee on specific personnel issues. You also state that the submitted information was created and transmitted by, to, and from the committee between privileged parties. Finally, you state that the submitted documentation of the committee was not intended to be disclosed to third persons; has been transmitted between privileged parties in furtherance of the rendition of

professional legal services to the district, and has not been released. Based on your representations and our review of the information that is subject to section 552.022(a)(1) of the Government Code, we find that the district has adequately demonstrated that this information constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to a client. Accordingly, we conclude that the district may withhold the portions of the submitted information that are subject to section 552.022(a)(1) pursuant to rule 503 of the Texas Rules of Evidence.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "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 id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Based on your representations and our review of the remaining submitted information, we find that the district has adequately demonstrated that this information constitutes

confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the district may withhold the remaining submitted information pursuant to section 552.107(1) of the Government Code.

In summary, the district may withhold the portions of the submitted information that are subject to section 552.022(a)(1) of the Government Code pursuant to rule 503 of the Texas Rules of Evidence. The district may withhold the remaining submitted information pursuant to section 552.107(1) of the Government Code.⁴

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).

⁴ As our ruling is dispositive, we need not address the district's remaining claimed exceptions to disclosure. We note that this ruling does not reach the issue of whether any information maintained by the district apart from the information transmitted by, to, or from the committee is protected from disclosure. See *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding) (citing *Methodist Home v. Marshall*, 830 S.W.2d 220, 224 (Tex. App. – Dallas 1992, orig. proceeding, for proposition that party may not cloak document with attorney-client privilege simply by forwarding it to attorney); *MortgageAmerica Corp. v. American Nat. Bank of Austin*, 651 S.W.2d 851, 858 (Tex. App. – Austin 1983, ref. n.r.e.) (stating that "mere delivery" of pre-existing document to attorney does not invoke attorney-client privilege); cf. *In re Monsanto Co.*, 998 S.W.2d 917, 932-33 (Tex. App. - Waco 1999, orig. proceeding).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 206158

Enc. Submitted documents

c: Mr. Todd Bensman
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(w/o enclosures)