



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2006

Mr. Alexis J. Fuller, Jr.
Davis & Davis
P.O. Box 1588
Austin, Texas 78767

OR2006-02638

Dear Mr. Fuller:

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# 244165.

The Sabine County Hospital District (the "district"), which you represent, received four requests from the same requestor for information relating to (1) contracts, letters of understanding, gifts, grants, loans, or any other agreement involving a named physician; (2) matters provided to or discussed by the district's board of directors at meetings held during November and December, 2005; and (3) expenses incurred for legal services performed by a named law firm and its attorneys since September 17, 2005. You have submitted information that the district seeks to withhold from the requestor under sections 552.101, 552.103, 552.104, and 552.107 of the Government Code and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information. We assume that the district has released the rest of the information to which the requestor seeks access, to the extent that such information existed when the district received these requests.¹ If not, then any other information that is responsive to these requests must be released immediately. See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

¹We note that the Act does not require the district to release information that did not exist when it received these requests or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We first note that the submitted information is contained in attorney fee bills and thus is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the 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 other law. Gov’t Code § 552.022(a)(16). Although you claim exceptions to disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions that a governmental body may waive. *See id.* § 552.007; *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 Gov’t Code § 552.103); 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 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the district may not withhold any of the submitted information under section 552.103 or section 552.107.

The Texas Supreme Court has held, however, that 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). Accordingly, we will address your assertion of the attorney-client privilege under rule 503. Additionally, we will address your claim under 552.104 of the Government Code.² We also will address section 552.101 of the Government Code.³

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

²Section 552.104(b) provides that “[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.” Gov’t Code § 552.104(b).

³Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. We note that section 552.101 does not encompass the attorney-client privilege. *See* Open Records Decision No. 676 at 1-3 (2002) (Gov’t Code § 552.101 does not encompass discovery privileges).

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. *Id.* 503(a)(5).

Thus, 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. 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted attorney fee bills document communications between attorneys for the district and their client that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state that such communications were not intended for disclosure to third persons. Based on your representations and our review of the submitted information, we have marked the information that the district may withhold under Texas Rule of Evidence 503.

Next, we address section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You seek to withhold information contained in Exhibits 5, 8, 9, 10, 11, and 12 under section 552.104. You state that the information in question pertains to competitive bidding processes, contracts, and other transactions. You do not inform us, however, whether any of the information in question actually relates to a competitive bidding situation that was in progress when the district received these requests for information. Likewise, you have not sufficiently explained how or why release of any of the information in question could cause some actual or specific harm to the district in a particular competitive situation. Therefore, having considered your arguments, we conclude that the district may not withhold any of the remaining information on the basis of section 552.104 of the Government Code.

Lastly, we address section 552.101 of the Government Code. This exception encompasses the common law right to privacy. Common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common law right to privacy protects certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).*

You state that Exhibit 4 contains information relating to a private financial matter that did not involve the district. Having considered your arguments, we conclude that none of the remaining information in Exhibit 4 is protected by common law privacy, and the district may not withhold any of the information in Exhibit 4 on that basis under section 552.101 of the Government Code.

In summary, the district may withhold the information that we have marked under Texas Rule of Evidence 503. The district must release the rest of the submitted information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 244165

Enc: Submitted documents

c: Mr. E.M. Farrell
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(w/o enclosures)