



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2009

Mr. Joseph E. Hoffer
Feldman, Rogers, Morris & Grover, L.L.P
517 Soledad Street
San Antonio, Texas 78205-1508

OR2009-06062

Dear Mr. Hoffer:

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# 340548.

The Judson Independent School District (the "district"), which you represent, received a request for a specified report. You claim that the requested information is excepted from disclosure under sections 552.105 and 552.107 of the Government Code and privileged pursuant to Texas Rules of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information was the subject of three previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-12570 (2008), 2008-13370 (2009), and 2008-14059 (2008). In Open Records Letter No. 2008-12570, we concluded that the information at issue consisted of a privileged attorney-client communication that the district could withhold under Texas Rules of Evidence 503. In Open Records Letter Nos. 2008-13370 and 2008-14059, we determined that the district could rely on Open Records Letter No. 2008-12570 as a previous determination for the information at issue. *See* Open Records Decision No. 673 (2001) (so

¹We note that, while the district also states the requested information is privileged under the Texas Disciplinary Rules of Professional Conduct, the district makes no arguments to support this assertion. Therefore, we do not address the applicability of the Texas Disciplinary Rules of Professional Conduct to the requested information. *See* Gov't Code §§ 552.301, .302.

long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

However, you state that, since the issuance of those three Open Records Letters, the district has released the information at issue. We note, and you acknowledge, that release of the information at issue constitutes a change in circumstances, and, thus, the district may not rely on Open Records Letter Nos. 2008-12570, 2008-13370 and 2008-14059 as previous determinations for the submitted information. Accordingly, we will address the district's arguments against the disclosure of this information.

Next, we note that submitted information consists of a completed report that is subject to section 552.022(a)(1) of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you assert the report is excepted under sections 552.105 and 552.107, these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 522 (1989) (discretionary exceptions in general). As such, sections 552.105 and 552.107 are not "other law" that make information confidential for the purposes of section 552.022; therefore, the district may not withhold the information under these sections. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your argument under Texas Rule of Evidence 503.

Rule 503(b)(1) provides the following:

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

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You explain that the submitted information constitutes a confidential communication from an attorney for the district to the district board that was made in furtherance of the rendition of professional legal services. You also assert the communication was intended to be confidential. However, you state that the district has previously released the requested information pursuant to a subpoena duces tecum from the Bexar County District Attorney’s Office (the “district attorney”) and a federal criminal summons from the Federal Bureau of Investigation (the “FBI”).²

Texas Rule of Evidence 511 states a person waives the discovery privileges if she voluntarily discloses the privileged information unless such disclosure itself is privileged. TEX. R. EVID. 511. *See Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1986).

²The district also informs us there has been an unauthorized release of the submitted information to the press.

In *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990), the court held that because privileged information was disclosed to the Federal Bureau of Investigation, the Internal Revenue Service, and the Wall Street Journal, the attorney-client and work product privileges were waived. You state that “in an effort to avoid litigation, to spare the expense of filing multiple motions to quash, and to cooperate with law enforcement,” the district chose to release the submitted information to the district attorney and the FBI. We find this release constitutes a voluntary waiver of the attorney-client privilege for purposes of Rule 511. *See id.*; *In re Bexar County Criminal Dist. Attorney’s Office*, 224 S.W.3d 182 (Tex., 2007) (district attorney waived work product privilege for case file by disclosing file to private litigant pursuant to subpoena duces tecum without objection); *see also S.E.C. v. Brady*, 238 F.R.D. 429 (N.D.Tex., 2006) (attorney-client privilege waived by disclosure of documents to Federal Securities and Exchange Commission.; noting Fifth Circuit has not adopted doctrine of selective waiver). Accordingly, the district may not withhold any of the submitted information on the basis of Texas Rule of Evidence 503.

We note that portions of the submitted information are subject to section 552.136 of the Government Code.³ Section 552.136 states that “[n]otwithstanding any other provision of this chapter, 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. Accordingly, we find that the district must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

The remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

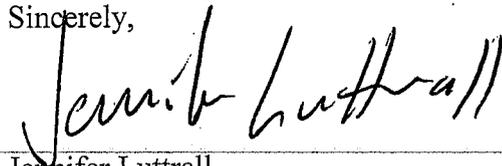
In summary, the district must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The district must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail address have affirmatively consented to their release. The remaining information must be released.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 340548

Enc. Submitted documents

c: Requestor
(w/o enclosures)