



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 2, 2009

Mr. David M. Swope  
Assistant County Attorney  
Harris County Attorney's Office  
1019 Congress 15<sup>th</sup> Floor  
Houston, Texas 77002

OR2009-12423

Dear Mr. Swope:

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# 354252 (File No. 09GEN0952).

The Harris County Attorney (the "county") received a request for nine categories of information relating to Texas voter ID legislation, voter registration, deputy voter registrar training, pending litigation against the county tax office, purging of voting records, a named state representative, four named entities, and the Lone Star Project.<sup>1</sup> You inform us that some of the requested information has been released. You state that other responsive information is the subject of a previous open records letter ruling. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

You inform us that some of the requested records were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2009-12279

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<sup>1</sup>You inform us that the county attorney requested and received clarification of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

(2009). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the county must dispose of the information that was the subject of Open Records Letter No. 2009-12279 in accordance with the previous ruling.<sup>2</sup> See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

~~Next, we note that some of the submitted information was created after the date of the county's receipt of the instant request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.<sup>3</sup> Therefore, information that did not exist when the county received the instant request is not responsive to the request. This decision does not address the public availability of the submitted non-responsive information, which we have marked, and that information need not be released in response to this request.~~

We also note that the county's assertion of the attorney work product privilege under section 552.111 of the Government Code was not timely under section 552.301 of the Government Code. See Gov't Code § 552.301(a)-(b). Although the county's deadline under section 552.301(b) to claim its exceptions to disclosure was July 1, the county first claimed section 552.111 in correspondence submitted to this office on July 8. The county's assertion of the work product privilege is not a compelling reason for non-disclosure of information that is presumed to be public under section 552.302 of the Government Code. See *id.* § 552.302; Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 or TEX. R. CIV. P. 192.5 does not provide compelling reason for non-disclosure if claim does not implicate third party rights). Although the county appears to contend that its claim under section 552.103 of the Government Code encompasses the work product privilege, this office has explained that the proper exception under which to claim that privilege is section 552.111. See ORD 677 at 2-4. Thus, the county has waived its assertion of the attorney work product privilege under section 552.111 and may not withhold any of the responsive information on that basis. See Open Records Decision No. 663 at 5 (1999) (waiver of discretionary exceptions).

We next note that the responsive information includes an order approved by the county commissioners court. The order, which we have marked, appears to have been adopted at a public meeting of the commissioners court and thus is an official record of a governmental body's public proceedings. As such, the marked order must be released. See Open Records

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<sup>2</sup>As we are able to make this determination, we need not address your claim for that information under section 552.101 of the Government Code.

<sup>3</sup>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).

Decision No. 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”).

We also note that some of the responsive information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) of the Government Code provides for required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]” Gov’t Code § 552.022(a)(3). We have marked a letter agreement that is subject to section 552.022(a)(3). Section 552.022(a)(4) provides for required disclosure of “the name of each official and the final record of voting on all proceedings in a governmental body[.]” *Id.* § 552.022(a)(4). We have marked a record of voting by the commissioners court that is subject to section 552.022(a)(4). Section 552.022(a)(16) provides for required 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. *Id.* § 552.022(a)(16). We have marked attorney fee bills that are subject to section 552.022(a)(16).

Although the county seeks to withhold the information that is subject to section 552.022(a)(3), (4), and (16) under sections 552.103 and 552.107(1) of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived); 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 confidential for the purposes of section 552.022(a)(3), (4) and (16). Therefore, the county may not withhold any of the information that is subject to section 552.022(a)(3), (4), or (16) 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). The attorney-client privilege, which the county claims under section 552.107(1), is also found at Texas Rule of Evidence 503. Accordingly, we will determine whether 503 is applicable to the information that is subject to section 552.022. Rule 503 enacts the attorney-client privilege and provides in part:

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).

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 contend that the information encompassed by section 552.022 consists of privileged attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services. You assert that the communications in question have not been disclosed to non-privileged parties. You have identified some of the parties to the communications. Based on your representations and our review of the information at issue, we conclude that the county may withhold the marked letter agreement under Texas Rule of Evidence 503. Although the record of voting by the commissioners court appears on a letter from an assistant county attorney to the members of the court dated December 16, 2008, the voting record is dated December 23, 2008. We therefore conclude that the county has not demonstrated that the voting record constitutes an attorney-client communication and may not withhold that information under rule 503. Thus, the voting record must be released pursuant to section 552.022(a)(4). We note that the county also claims the attorney-client privilege for all of the information in the attorney fee bills. Section 552.022(a)(16) provides,

however, that information "that is *in* a bill for attorney's fees" is not excepted from disclosure unless the information is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). Thus, by its express language, this provision does not permit all of the details in an attorney fee bill to be withheld from disclosure. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)); 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). We have marked information in the attorney fee bills that falls within the scope of the attorney-client privilege. The county may withhold that information under rule 503. The remaining information in the attorney fee bills must be released pursuant to section 552.022(a)(16).

Next, we address your claims under sections 552.103 and 552.107 of the Government Code for the responsive information that is not subject to section 552.022. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You contend that the remaining information at issue is related to a lawsuit styled *Texas Democratic Party v. Paul Bettencourt in his Capacity as Harris County Tax Assessor Collector and Harris County Voter Registrar*, No. H-08-3332. You state, and have provided pleadings reflecting, that the lawsuit was pending in the Houston Division of the United States District Court for the Southern District of Texas when the county received this request for information. Based on your representations and documentation, we find that an officer of the county was a party to pending litigation when the county received this request for information. We also find that the remaining information is related to the litigation. We therefore conclude that section 552.103 is generally applicable to the remaining information.

We note, however, that the opposing parties in the litigation have already seen or had access to some of the remaining information, including communications with opposing counsel in the litigation, which we have marked. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing parties to litigation have already seen or had access to information relating to the litigation through discovery or otherwise, then there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the opposing parties have already seen or had access to the remaining information, including the marked communications with opposing counsel, the county may not withhold any such information under section 552.103. The county may withhold the rest of the responsive information at this time under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also seek to withhold the marked communications with opposing counsel under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *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 Tex. 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)-(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, *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.” *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).

You claim that the marked communications with opposing counsel are protected by the attorney-client privilege. We find, however, that communications with opposing counsel are not confidential communications with privileged parties. *See* TEX. R. EVID. 503(b)(1)(A)-(E). We therefore conclude that the county may not withhold any of the marked communications with opposing counsel under section 552.107(1) of the Government Code.

Lastly, we note that the communications with opposing counsel contain his personal e-mail address. Section 552.137 of the Government Code provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure.<sup>4</sup> Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The county must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner has affirmatively consented to its public disclosure.

In summary: (1) the county must dispose of any information that was the subject of Open Records Letter No. 2009-12279 in accordance with the previous ruling; (2) the marked commissioners court order must be released; (3) the county may withhold the marked letter agreement and the marked information in the attorney fee bills under Texas Rule of Evidence 503; (4) the county must release the rest of the marked information that is subject

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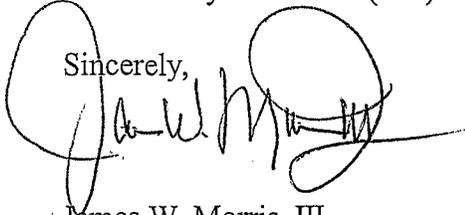
<sup>4</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

to section 552.022 of the Government Code; (5) the county may withhold the responsive information that is not subject to section 552.022 under section 552.103 of the Government Code, except for the marked communications with opposing counsel and any other information that the opposing parties in the litigation have already seen or to which they have had access; and (6) the county must withhold the marked e-mail address under section 552.137 of the Government Code unless the owner has consented to its disclosure. The rest of the responsive information must be released.

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](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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', written over a large, loopy circular flourish.

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

JWM/cc

Ref: ID# 354252

Enc: Submitted documents

c: Requestor  
(w/o enclosures)