



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2011

Mr. Ty H. Embrey
Lloyd Gosselink Rochelle & Townsend, PC
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2011-04752

Dear Mr. Embrey:

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# 413899.

The Panola County Groundwater Conservation District (the "district"), which you represent, received a request for information related to (1) groundwater modeling, (2) any groundwater management plan, (3) desired future conditions, (4) managed available groundwater, (5) any agendas, minutes, and other documents related to meetings in which items one through four were discussed, and (6) any proposed or executed contracts regarding items one through four.¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.² We have considered your arguments and reviewed the submitted information, a portion of which is a representative sample.³

¹You state, and provide documentation showing, the district sought and received clarification of the request. *See* Gov't Code § 522.222(b) (stating if information requested is unclear or if large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise Texas Rule of Evidence 503 in conjunction with section 552.101 of the Government Code, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

³We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, you state portions of the requested fee bills are not responsive to the instant request because they do not pertain to the topics specified in the request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request.

We next note you have not submitted any information responsive to part five of the request, regarding public notices, agendas, minutes, recordings and other documents related to meetings in which specified subjects were addressed. To the extent information responsive to part five of the request existed on the date the district received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

You acknowledge portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

....
(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

....
(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)(3), (16). In this instance, the submitted information contains attorney fee bills (Exhibit E) and a signed contract relating to the expenditure of public funds by the district (Exhibit G). Thus, the district must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless it is expressly confidential under "other law." Although you raise section 552.107 for Exhibit G, section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold Exhibit G under section 552.107(1) of the Government Code. However, the supreme court has held the

attorney-client privilege in Texas Rule of Evidence 503 is "other law" that makes information expressly confidential for purposes of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You have raised rule 503 for Exhibit E, and we will also consider your assertion of the attorney-client privilege for Exhibit G 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 it is 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 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 it was not intended to be disclosed to third persons and 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). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the contract in Exhibit G and the attorney fee bills in Exhibit E are privileged in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides that information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under “other law” or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See* Open Records Decision 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).

In the alternative, you assert the portions of the submitted fee bills you have marked should be withheld under rule 503. You state the highlighted entries in the fee bills in Exhibit E, along with the contract in Exhibit G, contain privileged attorney-client communications between the district and its attorneys. You state the communications at issue were made in furtherance of the rendition of legal services. Further, you state Exhibits E and G were intended to be, and have remained, confidential. Based on your representations and our review of the information at issue, we find the district may withhold Exhibit G and the information we have marked in Exhibit E under Texas Rule of Evidence 503. As you raise no additional exceptions for the remaining responsive information in Exhibit E, it must be released to the requestor.

You raise section 552.107 of the Government Code for the communications in Exhibit F. This section protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege. ORD 676 at 6-7 (2002). First, a governmental body must demonstrate 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. 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. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact 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. TEX. R. EVID. 503(b)(1). 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. Fourth, the attorney-client privilege applies only to a confidential communication, *id.*, 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 state the communications at issue are between the district's legal counsel and district staff. You indicate the communications were made to facilitate the rendition of legal advice to the district. You state these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review of the information at issue, we find the district may withhold Exhibit F under section 552.107 of the Government Code.

In summary, the district may withhold Exhibit G and the information we have marked in Exhibit E under Texas Rule of Evidence 503. The district may withhold Exhibit F under section 552.107 of the Government Code. The remaining responsive information in Exhibit E must be released to the requestor.

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, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/eeg

Ref: ID # 413899

Enc. Submitted documents

c: Requestor
(w/o enclosures)