



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2014

Mr. John J. Carlton
Attorney for Travis County Emergency Services District No. 11
The Carlton Law Firm, P.L.L.C.
2705 Bee Cave Road, Suite 200
Austin, Texas 78746

OR2014-04842

Dear Mr. Carlton:

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# 517406.

The Travis County Emergency Services District No. 11 (the "district"), which you represent, received a request for two specified emails and all correspondence between two named individuals for a specified period of time. You state you have released some of the information to the requestor. You claim some of the information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request for information because it was created outside the time period specified in the request.¹ This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release such information in response to this request.

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic 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).

You argue Exhibit B does not consist of public information subject to the Act. The Act is applicable only to "public information." Gov't Code. §§ 552.002, .021. Section 552.002(a) defines "public information" as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the information you have submitted is not subject to the Act because it was limited to the personal opinions of an individual in his capacity as a private citizen and are not connected with any transaction of official business. After reviewing the information at issue, we agree the information at issue does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district. See Gov't Code § 552.021; see also Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus Exhibit B is not subject to the Act, and the district is not required to release it in response to this request.²

Next, we note some of the remaining information contains an attorney fee bill which is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

for 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 confidential under the Act or other law. Gov’t Code § 552.022(a)(16). You seek to withhold the information at issue under section 552.107(1) of the Government Code. However, section 552.107(1) is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold any portion of the submitted fee bill under section 552.107(1). However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. Further, we will address your claim under section 552.107 for the information not subject to section 552.022.

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 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).

We note the submitted fee bill subject to 552.022(a)(16) is attached to communications between the district's outside attorney and district officials and staff in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the district. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has established the attorney fee bill which is subject to 552.022(a)(16), constitutes attorney-client communications under rule 503. Thus, the district may withhold the submitted fee bill in its entirety pursuant to rule 503 of the Texas Rules of Evidence. However, we find the remaining information does not constitute an attorney-client communication for the purposes of Texas Rule of Evidence 503. Thus, none of the remaining information may be withheld on that basis.

You claim the remaining information in Exhibit C is protected by section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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 information at issue consists of communications involving employees of the district and attorneys or attorney representatives for the district. You also state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the district and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold the information we have marked under section 552.107(1) of the Government Code.

However, upon review, we find some of the communications were not made in confidence for the purpose of facilitating the rendition of professional legal services to the district. Thus, we find you have not demonstrated the remaining information reveals privileged attorney-client communications for the purposes of section 552.107(1). Thus, the remaining information at issue may not be withheld on that basis.

In summary, Exhibit B is not subject to the Act and need not be released to the requestor. The district may withhold the submitted fee bill in its entirety under Texas Rule of Evidence 503. The district may withhold the information we have marked under section 552.107(1) of the Government Code. The remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Rashandra C. Hayes", with a long horizontal flourish extending to the right.

Rashandra C. Hayes
Assistant Attorney General
Open Records Division

RCH/dls

Ref: ID# 517406

Enc. Submitted documents

c: Requestor
(w/o enclosures)