



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 6, 2014

Mr. Mack T. Harrison  
Assistant Criminal District Attorney  
Caldwell County  
P.O. Box 869  
Lockhart, Texas 78644

OR2014-09721

Dear Mr. Harrison:

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# 525051.

The Caldwell County Commissioners Court (the "court") received four requests from the same requestor for documents, communications, minutes, and budgets showing where a named judge was given another named individual's extra cases and where a named individual was fired by the court. You state the court does not have some of the requested information.<sup>1</sup> You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We 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, we note one of the communications contains an attachment that has been filed with a court. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless it is made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(17). Although you seek to withhold this information under section 552.107 of the Government Code, this is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the court may not withhold the court-filed document under section 552.107 of the Government Code. However, the attorney-client privilege is also found in Texas Rule of Evidence 503, which the Texas Supreme Court has held is "other law" within the meaning 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 for the court-filed document.

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 state the submitted court-filed document is an attachment to a confidential communication between the court's attorneys and legal staff and its elected officials. You state this communication was made in the further of the rendition of legal services to the court and was not intended to be disclosed to third parties. Further, you inform this office this communication has remained confidential. However, we note the court-filed document has been seen by non-privileged parties, and this document is separately responsive to the request. Accordingly, to the extent this non-privileged court-filed document, which we have marked, exists separate and apart from the privileged e-mail communication to which it is attached, the court may not withhold it under rule 503 of the Texas Rules of Evidence. If the marked court-filed document does not exist separate and apart from the privileged communication, the court may withhold it under rule 503 of the Texas Rules of Evidence.

We now address your argument for the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) 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 assert the information not subject to section 552.022 consists of confidential communications between the court's attorneys and legal staff and its elected officials. You state these communications were made in the further of the rendition of legal services to the court and were not intended to be disclosed to third parties. Further, you inform this office these communications have remained confidential. Based on your representations and our review, we find the court may generally withhold the information not subject to section 552.022 under section 552.107(1) of the Government Code. We note, however, some of these privileged communications include attachments received from or sent to non-privileged parties. Furthermore, if the attachments received from or sent to

non-privileged parties are removed from the communications and stand alone, they are responsive to the requests for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the court separate and apart from the otherwise privileged communications in which they appear, then the court may not withhold these non-privileged attachments under section 552.107(1) of the Government Code, and they must be released.

In summary, if the marked court-filed document does not exist separate and apart from the privileged communication, the court may withhold it under rule 503 of the Texas Rules of Evidence. The court may withhold the remaining information under section 552.107 of the Government Code unless the non-privileged attachments are maintained by the court separate and apart from the otherwise privileged communications in which they appear. 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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/bhf

Ref: ID# 525051

Enc. Submitted documents

c: Requestor  
(w/o enclosures)