



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 1, 2015

Mr. Jose R. Guerrero
Counsel for the Region One Education Service Center
Guerrero Law Firm
1001 South 10th Street, Suite 221
McAllen ,Texas 78501

OR2015-18261

Dear Mr. Guerrero:

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# 577717.

The Region One Education Service Center (the "center"), which you represent, received a request for seven categories of information pertaining to the Texas Energy Center program, Texas Energy Aggregators, Texas Energy Consultants, and Van Brundt & Associates. The center claims the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note we have marked some of the submitted information as non-responsive. This information is not responsive to the present request because it was created after the date of the center's receipt of the request. This ruling does not address the public availability of non-responsive information, and the center is not required to release such information in response to this request.

Next, we note, and the center acknowledges, Items 5, 6, and 7 are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). Items 5, 6, and 7 consist of information in an account, voucher, or contract that is subject to section 552.022(a)(3) and attorney fee bills that are subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. Although the center seeks to withhold this information under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; 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 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held 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). Therefore, we will consider the center's assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(16). We note some of the information subject to section 552.022 is subject to section 552.136 of the Government Code.¹ As section 552.136 can make information confidential under the Act, we will address the applicability of this exception to the information at issue. Further, we will consider the center's arguments under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470(1987).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* ORD 676. 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, orig. proceeding) (privilege attaches to complete communication, including factual information).

The center states the information it has marked in the attorney fee bills reflects attorney-client communications between the center's outside counsel and representatives of the center. The center states these communications were made for the purpose of providing professional legal advice to the center. The center further states these communications were intended to be and have remained confidential. Based on these representations and our review of the information at issue, we find the information we have marked constitutes attorney-client communications. Thus, the center may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, we find the center has failed to demonstrate the remaining information at issue consists of privileged attorney client communications. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find the center has failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, no portion of the remaining information at issue may be withheld under rule 503, and it must be released.

Section 552.103 of the Government Code provides, in pertinent 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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The center claims the information not subject to section 552.022 is excepted from disclosure under section 552.103. The center informs us, and provides documentation showing, prior to the center's receipt of the present request, the center filed a lawsuit against the requestor, seeking a declaration of rights under the contract between the two parties. The center further asserts the information at issue is related to the issues underlying this litigation. Based on these representations and our review, we find the center was a party to pending litigation when it received the present request for information. Further, we find the information at issue relates to the pending litigation. Thus, the center may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

We note 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. Thus, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], 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(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Therefore, the center must withhold the account number we have marked in the remaining information under section 552.136 of the Government Code.

In summary, the center may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. The center may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The center must withhold the account number we have marked under section 552.136 of the Government Code. The center must release the remaining responsive information.

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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 577717

Enc. Submitted documents

c: Requestor
(w/o enclosures)