



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 20, 2016

Mr. Mark Anthony Sanchez, Esq.  
Counsel for the Bexar County Emergency Services District #2  
Sánchez & Wilson, PLLC  
115 East Travis, 19<sup>th</sup> Floor  
San Antonio, Texas 78205

OR2016-01400

Dear Mr. Sanchez:

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# 595383 (ORR# 5954).

The Bexar County Emergency Services District #2 (the "district"), which you represent, received a request for photographs of a named former district board member; all compensation and fees paid by the district to a named attorney; and any reports and correspondence with the named attorney, with the exception of a specified investigation. You state the district does not maintain any photographs of the named former district board member.<sup>1</sup> You claim the submitted information is excepted from disclosure under

---

<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.<sup>2</sup> We have considered submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request for information because it does not consist of any of the categories of requested information, or it consists of the specified investigation. 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 such information in response to this request.

Next, we note some of the submitted information may have been responsive to a previous request for information from the same requestor, as a result of which this office issued Open Records Letter No. 2015-20965 (2015). In that ruling, we determined the district may withhold the information we marked under Texas Rule of Evidence 503 but must release the remaining requested information, including any information responsive to the prior request that was not submitted for our review. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold any of the submitted information that was previously ordered released unless release of such information is expressly prohibited by law or the information is confidential by law. You seek to withhold the submitted information under the attorney-client privilege of section 552.107(1) of the Government Code and Texas Rule of Evidence 503. Section 552.107(1) and Texas Rule of Evidence 503 do not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, to the extent the submitted information was responsive to the prior request for information, we conclude the district must rely on Open Records Letter No. 2015-20965 as a previous determination and withhold or release that information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of

---

<sup>2</sup>Although you also argue rule 192.5 of the Texas Rules of Civil Procedure applies to the submitted information, you have not provided any arguments to support your claim. Therefore, we assume you have withdrawn your claim this privilege applies to the submitted information. *See* Gov't Code §§ 552.301, .302. Further, although the district raises section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Procedure 192.5, 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).

previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information was not responsive to the prior request, we will address your arguments against its disclosure.

Next, we note some of the responsive information is 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [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)(1), (16). The responsive information includes completed investigations that are subject to section 552.022(a)(1). The district must release the completed investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains 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. *See id.* § 552.022(a)(16). You seek to withhold the responsive information under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See 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 responsive information subject to section 552.022 may not be withheld under 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). Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the responsive information subject to section 552.022 of the Government Code. We will also consider your argument under section 552.107(1) of the Government Code for the information not subject to section 552.022.

Texas Rule of Evidence 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 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 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, orig. proceeding).

You assert the responsive information subject to section 552.022 of the Government Code must be withheld in its entirety under rule 503. You inform us the information at issue was communicated between attorneys for the district and employees of the district in their capacities as clients and client representatives. You explain the information was created in furtherance of the rendition of professional legal services to the district. You state the

information at issue was not intended for release to third parties, and you state the district has maintained the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information subject to section 552.022(a)(1) of the Government Code. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold the responsive information subject to section 552.022(a)(1) under rule 503 of the Texas Rules of Evidence.

However, section 552.022(a)(16) of the Government Code provides 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 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). Accordingly, the district may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503. Upon review, we find the district has established the information we have marked within the attorney fee bills constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked within the attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

However, we find you have failed to demonstrate the remainder of the fee bills at issue consists of privileged attorney client communications. We note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have failed to demonstrate the remaining information at issue was communicated and it does not reveal a client confidence. Accordingly, no portion of the remainder of the fee bills at issue may be withheld under rule 503.

You claim section 552.107 of the Government Code for the responsive information not subject to section 552.022 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* Open Records Decision No. 676 at 6-7 (2002). 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).

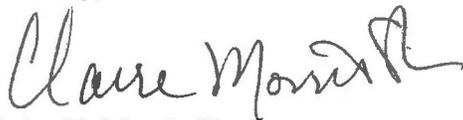
As noted above, you inform us the information at issue consists of communications between an attorney for the district and district officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the district. You state the communications were intended to be 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. Accordingly, the district may withhold the information not subject to section 552.022 of the Government Code under section 552.107 of the Government Code.

In summary, to the extent the responsive information was also responsive to the prior request for information, the district must rely on Open Records Letter No. 2015-20965 as a previous determination and withhold or release that information in accordance with that ruling. To the extent the responsive information was not responsive to the prior request, the district may withhold the responsive information subject to section 552.022(a)(1) of the Government Code and the information we marked within the attorney fee bills under Texas Rule of Evidence 503. The district may withhold the responsive information not subject to section 552.022 of the Government Code pursuant to section 552.107(1) of the Government Code. The district must release the remainder of the submitted attorney fee bills pursuant to section 552.022(a)(16) of the Government Code.

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 595383

Enc. Submitted documents

c: Requestor  
(w/o enclosures)