



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 29, 2016

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2016-07006

Dear Ms. Cost:

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# 603611 (PIR# 16-0046).

The Texas Department of Public Safety (the "department") received a request for any correspondence from a named trooper's legal representatives. The department claims the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.¹ Additionally, the department states release of the submitted information may implicate the interests of the Office of the Attorney General (the "OAG"). Accordingly, the department states, and provides documentation showing, it notified the OAG of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the OAG. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the department has marked some information as not responsive to the request. We agree this information is not responsive as it is not from the named trooper's legal representatives. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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).

Next, we note some of the submitted 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:

...

(17) information that is also contained in a public court record[.]

Id. § 552.022(a)(17). The information at issue includes court-filed documents that are subject to section 552.022(a)(17) and must be released unless they are made confidential under the Act or other law. *See id.* The department and the OAG seek to withhold these court-filed documents under sections 552.107 and 552.108 of the Government Code. However, these sections are discretionary exceptions and do 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), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the court-filed documents may not be withheld under section 552.107 or section 552.108. 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). We will, therefore, consider the assertion of the attorney-client privilege under Rule 503 for the information subject to section 552.022(a)(17). We will also consider arguments under sections 552.107 and 552.108 against disclosure of the information not subject to section 552.022.

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 department and OAG assert the submitted court-filed documents, which are attachments to e-mails sent from an attorney representing the department and the named trooper to department employees, were communicated for the purpose of facilitating the rendition of professional legal services to the department. The department and OAG further state the communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the department and OAG demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold the court-filed documents under Rule 503 of the Texas Rules of Evidence.²

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above 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. ORD 676 at 6-7. Section 552.107(1) generally excepts from disclosure an entire communication that is demonstrated to be protected by the attorney-client privilege unless

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

otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

The department and OAG claim the submitted information that is not subject to section 552.022(a)(17) is excepted from disclosure under section 552.107(1) of the Government Code. The department and OAG state the information at issue consists of communications from an attorney representing the department and named trooper to department employees, and the communications were made for the purpose of facilitating the rendition of professional legal services to the department. Further, both state the confidentiality of the information at issue has not been waived. Based on these representations and our review, we find the department and OAG demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the department may withhold the information not subject to section 552.022(a)(17) of the Government Code under section 552.107(1) of the Government Code.³

In summary, the department may withhold the information subject to section 552.022(a)(17) of the Government Code under Rule 503 of the Texas Rules of Evidence. The department may withhold the remaining information under section 552.107(1) 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, 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Ref: ID# 603611

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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