



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 3, 2016

Mr. Scott R. Shoemaker
Counsel for Crystal Clear Special Utility District
The Terrill Firm
810 West 10th Street
Austin, Texas 78701

OR2016-09976

Dear Mr. Shoemaker:

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# 608413.

The Crystal Clear Special Utility District (the "district"), which you represent, received a request for documents and correspondence regarding the district and water service at the Cherryville development during a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.² We have considered your arguments and reviewed the submitted information.

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil 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).

Initially, we note the district did not fully comply with section 552.301 of the Government Code. Section 552.301(b) requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.” Gov’t Code § 552.301(b). While the district raised section 552.107 and Texas Rule of Evidence 503 within the ten-business-day time period as required by section 552.301(b), the district did not raise section 552.111 or Texas Rule of Civil Procedure 192.5 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Because section 552.111 of the Government Code and the attorney work product privilege of rule 192.5 are discretionary in nature, no portion of the submitted information may be withheld under section 552.111 or rule 192.5. *See id.* § 552.007; *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111 and rule 192.5), 665 at 2 n.5 (2000) (discretionary exceptions generally). We will consider the district’s timely-raised exceptions to disclosure for the submitted information.

Next, we note the submitted information contains information 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[.]

Gov’t Code § 552.022(a)(3). The submitted information contains a contract relating to the receipt of funds by the district that is subject to section 552.022(a)(3). The district must release the contract pursuant to section 552.022(a)(3) unless the information is made confidential under the Act or other law. Although you raise section 552.107 of the Government Code for the contract subject to section 552.022(a)(3), this section is a discretionary exception to disclosure 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, 663 at 5. Therefore, the information subject to section 552.022(a)(3), which we marked, may not be withheld under section 552.107 of the Government Code. The Texas Supreme Court has held, however, 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

attorney-client privilege claim under rule 503 of the Texas Rules of Evidence. We will also consider your argument under section 552.107 for the information not subject to section 552.022(a)(3).

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 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).

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. 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 state the information subject to section 552.022(a)(3) consists of an attachment to a privileged e-mail communication between district attorneys and district staff in their capacity as clients that was made for the purpose of providing legal services to the district. You state the communication was intended to be confidential and has remained confidential. Thus, rule 503 is applicable to the information at issue. However, if the attachment is removed from the e-mail and stands alone, it is responsive to the request for information. Therefore, if this non-privileged attachment, which we marked, is maintained by the district separate and apart from the otherwise privileged e-mail to which it is attached, then the district may not withhold the attachment under Texas Rule of Evidence 503. If the marked attachment subject to section 552.022(a)(3) does not exist separate and apart from the e-mail to which it is attached, the district may withhold it under rule 503.

Section 552.107(1) of the Government Code also protects information coming 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 state the remaining information consists of communications between the district's attorneys and their representatives and district employees in their capacities as clients. You explain these communications were made in furtherance of the rendition of professional legal services to the district. Further, you state these communications were intended to be confidential and the district has not waived the confidentiality of the information. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to portions of the remaining information. However, we note the remaining communications include individuals the district has not demonstrated are privileged. Accordingly, the district may not withhold these communications, which we marked for release, under section 552.107(1). Additionally, we note some of the otherwise privileged e-mail strings include e-mails sent to or received from non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged communications under section 552.107(1) of the Government Code. Accordingly, with the exception of the information we marked for release, the district may generally withhold the information not subject to section 552.022(a)(3) under section 552.107. However, if the

e-mails we marked exist separate and apart from the otherwise privileged e-mail strings, such e-mails may not be withheld under section 552.107 of the Government Code.

In summary, if the attachment subject to section 552.022(a)(3) of the Government Code, which we marked, does not exist separate and apart from the otherwise privileged e-mail to which it is attached, the district may withhold it under Texas Rule of Evidence 503. With the exception of the information we marked for release, the district may generally withhold the remaining information that is not subject to section 552.022(a)(3) of the Government Code under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings, then the district may not withhold these non-privileged e-mails 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,



Ian Lancaster
Assistant Attorney General
Open Records Division

IML/akg

Ref: ID# 608413

Enc. Submitted documents

c: Requestor
(w/o enclosures)