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OPEN RECORDS DECISION NO. 676
(ORQ-40)

November 30, 2002

RE: Re-evaluation of Open Records Decision No. 574 (1990) regarding the scope of the attorney-client privilege under section 552.107(1) of the Government Code; whether section 552.101 of the Government Code also encompasses the attorney-client privilege; whether the attorney-client privilege is mandatory and compelling for purposes of the Public Information Act; and related questions.

AUTHORITY

Under section 552.011 of the Government Code we consider the scope of the section 552.107(1) exception, and related questions pertaining to the attorney-client privilege in the context of the Public Information Act (the "Act").[1]

THE PROPER EXCEPTION FOR THE ATTORNEY-CLIENT PRIVILEGE

Recent case law, without analysis, suggests that the attorney-client privilege may be asserted under either section 552.107(1) or section 552.101 of the Government Code.[2] While recognizing that section 552.107(1) specifically incorporates the privilege into the Act, one court states that the "catch-all provision of Section 552.101 certainly includes information governed by the attorney-client privilege."[3] Prior to 1990, this office had also construed the statutory predecessor to section 552.101 to incorporate the attorney-client privilege.[4] But in 1990, this office concluded that section 552.101 does not encompass discovery privileges

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[1]Unless otherwise specifically noted, references to section numbers in this decision are to sections contained in chapter 552 of the Government Code.

[2]*Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Hart v. Gossum*, 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no pet.).

[3]*Hart*, 995 S.W.2d at 963 n.2; *see also Garland v. Dallas Morning News*, 22 S.W.3d at 360 n.5. Notably, neither the *Hart* nor the *Garland* court was squarely confronted with the issue of which exception or exceptions under the Act properly incorporate an assertion of attorney-client privilege. Rather, the mention in both cases that section 552.101 may also incorporate the privilege was ancillary to the actual issues addressed in each decision.

[4]*See, e.g.*, Open Records Decision No. 210 at 2 (1978).

in general.[5] Unlike "confidential" information to which section 552.101 applies, the public distribution of "privileged" information by a governmental body, as holder of the privilege, does not implicate criminal penalties under the Act.[6]

The Texas attorney-client privilege is found at Rule 503 of the Texas Rules of Evidence.[7] In a recent case, the Texas Supreme Court held that the Texas Rules of Evidence, as well as the Texas Rules of Civil Procedure, comprise "other law" that may make information "confidential" under section 552.022 of the Act.[8] The case holds that the terms "confidential under other law" in section 552.022 of the Act include "privileged" information.[9] But in the case, the section 552.101 exception was not at issue. Notably, section 552.101's language differs from that of section 552.022. Unlike section 552.022, section 552.101 does not employ the terms "confidential under other law." Section 552.101 states that it excepts from disclosure information that is "confidential by law, either constitutional, statutory, or by judicial decision."[10] We find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101's purview.

Section 552.101's language of "confidential by law, either constitutional, statutory, or by judicial decision" refers to information that a governmental body may not choose to release,[11] and the improper disclosure of which results in criminal penalties under the Act.[12] Thus, when section 552.101 applies, the Act prohibits the governmental body from disclosing the information. Information subject to the attorney-client privilege is not confidential in this sense. The privilege rests with the client governmental body, and like any client, the governmental body is free to waive it. Accordingly, if in the open records ruling process the

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[5]*See* Open Records Decision No. 575 at 2 (1990).

[6]*See* TEX. GOV'T CODE § 552.352 (declaring it an offense and providing for a fine, jail time, or both if a person distributes information that is considered "confidential" under the terms of the Act).

[7]*See* TEX. R. EVID. 503.

[8]*In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

[9]*Id.* at 334; *but see* TEX. GOV'T CODE § 552.007 (governmental body may not choose to release information that is "confidential under law"); *id.* § 552.352 (providing criminal penalties for distribution of information considered "confidential" under the terms of the Act).

[10]TEX. GOV'T CODE § 552.101.

[11]*Id.* § 552.007.

[12]*Id.* § 552.352.

attorney-client privilege is asserted under section 552.101, this office shall consider it an assertion of the more specific section 552.107(1) exception.[13]

THE SCOPE OF THE SECTION 552.107(1) EXCEPTION

Section 552.107(1) excepts from disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under" the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct (the "ethics rules"). Rule 1.05 of the ethics rules generally imposes a duty of confidentiality on an attorney regarding client information.[14] Confidentiality under this rule applies to "privileged information"[15] and "unprivileged client information," defined as "all information relating to a client or furnished by the client" that is "acquired by the lawyer during the course of or by reason of the representation of the client." We have received arguments that the plain language of section 552.107(1) necessarily protects any information that meets this definition. We disagree.

This plain language argument fails to note that ethics rule 1.05 contains an exception to confidentiality, permitting disclosure of client information "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with . . . other law."[16] In the absence of any indication to the contrary, such "other law" necessarily includes the Act, the purpose of which is to impose a duty under law on a client *governmental body* to, generally, disclose its information,[17] and which specifically requires that "public information"[18] be "available to the public at a minimum during the normal business hours of the governmental body."[19] Thus, a governmental body's information that is otherwise made confidential *solely* under rule 1.05 is subject to the rule's "other law" exception to confidentiality when it is requested under the

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[13]As explained below, in the case of information subject to section 552.022 of the Government Code, this office shall consider the assertion to be an assertion of Texas Rule of Evidence 503.

[14]*See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

[15]Defined as information protected under Texas Rule of Evidence 503 or the federal attorney-client privilege. *See* FED. R. EVID. 501; *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[16]TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(4).

[17]TEX. GOV'T CODE § 552.001.

[18]As defined in TEX. GOV'T CODE § 552.002.

[19]*Id.* § 552.021.

Act.[20] Section 552.107(1), therefore, does not except from disclosure all information that a governmental attorney may otherwise have a duty under ethics rule 1.05 to maintain as confidential.[21]

An attorney for a governmental body has an independent duty of confidentiality for information subject to the attorney-client privilege as defined in Texas Rule of Evidence 503.[22] Rule 503 contains no exception to confidentiality like the exception in ethics rule 1.05. Thus, information that is protected under Texas Rule of Evidence 503 is excepted from disclosure under section 552.107(1).

In comments to this office, one governmental body has expressed concern that attorneys for governmental bodies may be subject to disciplinary action for allegedly violating ethics rule 1.05 due to the release of information under the Act. We believe this concern is unwarranted. First, the release of information in compliance with the Act is made by the governmental body through its officer for public information.[23] Moreover, this precise issue was addressed in a 1996 ethics opinion that, in light of the applicability of the Act's disclosure requirements, declined to decide whether information requested under the Act was confidential under ethics rule 1.05.[24] The opinion specifically referred to the rule's "other law" exception to confidentiality, as well as comment 22 of the rule, which recognizes that "a lawyer may be obligated by other provisions of statutes or other law to give information about a client."[25]

But in restricting the scope of section 552.107(1) to "privileged" information, this office has engaged in a practice of conducting a word-by-word examination of information in documents, granting the exception only to the very specific information comprising a "client confidence" or attorney advice, opinion, or analysis.[26] We now reconsider this practice.

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[20]Information that is subject to the Texas attorney-client privilege is not made confidential *solely* under Rule 1.05. Rule 503 of the Texas Rules of Evidence also makes such information confidential. *See* TEX. R. EVID. 503.

[21]As this office noted in 1990, the ethics rules specifically contemplate, in some circumstances, different treatment of government attorneys. The fact that the government attorney's client is subject to the Act is one such circumstance. *See* Open Records Decision No. 574 at 4 (1990).

[22]*See* TEX. R. EVID. 503.

[23]*See* TEX. GOV'T CODE §§ 552.201 - .205.

[24]*See* Tex. Comm. on Prof'l Ethics, Op. 517, 59 Tex. B.J. 795 (1996).

[25]*Id.*

[26]*See, e.g.*, Open Records Decision Nos. 574 (1990), 462 (1987).

Texas courts protect *from discovery* under rule 503 the entirety of a "communication" that is confidential under the rule.[27] A governmental body has as much right as a private individual to consult with its attorney without risking the disclosure of communications protected by the attorney-client privilege.[28] Thus, we believe the holdings in the above-cited cases generally apply to the scope of section 552.107(1)'s protection.[29] We therefore conclude that section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege as defined in Texas Rule of Evidence 503.

SECTION 552.022 INFORMATION, INCLUDING ATTORNEY FEE BILLS

Section 552.022 provides for eighteen categories of information that are "not excepted from required disclosure" under the Act "unless they are expressly confidential under other law[.]" Among these categories is "information that is *in* a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]"[30] This language makes clear that the Act does not permit the *entirety* of an attorney fee bill to be excepted on the basis that the fee bill contains or is an attorney-client communication.[31] Thus, information in an attorney fee bill

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[27]*See, e.g., Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Bloomfield Mfg. Co.*, 977 S.W.2d 389, 392 (Tex. App.—San Antonio 1998, orig. proceeding) (privilege extends to entire document); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to the complete communication, including factual information); *Osborne v. Johnson*, 954 S.W.2d 180, 190 (Tex. App.—Waco 1997, orig. proceeding) (if document contains information that is discoverable together with privileged information, entire document is protected by the privilege); *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 589 (Tex. App.—Dallas 1994, orig. proceeding) (privilege attaches to the complete communication); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (privilege extends to entire document and not merely the specific portions relating to advice, opinion, or analysis).

[28]*Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App.—Waco 1997, writ denied); *see also* TEX. R. EVID. 503(a)(1) (public or private entity is considered a "client" for purposes of application of attorney-client privilege).

[29]This conclusion is supported by a recent case addressing the applicability of the attorney-client privilege, in the context of the Act, to a report requested under the Act that had been prepared by an attorney. The Third Court of Appeals found that section 552.107(1) excepted the entirety of the report. *Harlandale I.S.D. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied).

[30]TEX. GOV'T CODE § 552.022(a)(16) (emphasis added).

[31]This is an express legislative departure from case law pertaining to the applicability of the attorney-client privilege to attorney fee bills in the litigation discovery context. Where information in an attorney fee bill is demonstrated to be privileged to the satisfaction of the court, the entirety of the fee bill is protected. *See, e.g., Clark v. American Commerce Nat'l Bank*, 974 F.2d 127 (9th Cir. 1992).

may only be withheld to the extent the particular information is demonstrated to be subject to the attorney-client privilege, or is otherwise confidential under other law.[32]

With regard to *all* section 552.022 information, including attorney fee bills, it is also important to note that section 552.107(1) is an exception to disclosure *under the Act* and not "other law" that makes information "expressly confidential." Thus, the appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503 and not section 552.107(1). The Texas Supreme Court has concluded that the Texas Rules of Evidence comprise "other law" for purposes of section 552.022.[33] This decision notes that Texas Rule of Evidence 503 employs the term "confidential," such that the rule constitutes "other law" that may make information "expressly confidential" for purposes of section 552.022.[34] However, for information that is *not* subject to section 552.022, the appropriate exception for a claim of attorney-client privilege is section 552.107(1). This is because such information is not excepted from disclosure except to the extent that one or more exceptions *under the Act* applies to it.[35]

DEMONSTRATING THE ATTORNEY-CLIENT PRIVILEGE

A governmental body carries the burden in the open records ruling process of demonstrating to this office how and why information is excepted from required public disclosure.[36] The applicability of the attorney-client privilege to particular information depends more on the facts surrounding the creation and maintenance of the information than on its content.[37] If a governmental body fails to provide this office sufficient facts pertaining to the creation and

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[32]A governmental body must, of course, comply with the Act's procedural requirements if it wishes to withhold information in an attorney fee bill on the basis of attorney-client privilege. These include marking the "parts of the copy" in the fee bill for which the privilege is asserted, and submitting written comments in support of the privilege for each such marking. *See* TEX. GOV'T CODE § 552.301(e)(1)(A), (2); *see also Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 997 P.2d 681 (Kan. 2000) (narrative statements contained in attorney fee bills are not *per se* exempt from disclosure under state open records act; the governmental body has the burden of demonstrating how the attorney-client privilege applies to each specific narrative statement for which the privilege is asserted).

[33]*In re City of Georgetown*, 53 S.W.3d at 336.

[34]*Id.* at 333.

[35]TEX. GOV'T CODE § 552.006.

[36]*Id.* § 552.301(e)(1)(A) (a governmental body must submit to this office,among other information, written comments stating the reasons why the stated exceptionsapply that would allow the information to be withheld).

[37]*See, e.g., Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (subject matter of information communicated between attorney and client is irrelevant to whether attorney-client privilege applies).

maintenance of the information so as to affirmatively demonstrate the privilege with respect to each document or record at issue, we cannot assume such facts.[38] The governmental body may thereby fail to meet its burden.[39] When asserting the attorney-client privilege, a governmental body's burden necessarily includes demonstrating the elements of the privilege. We therefore next examine certain elements of the Texas privilege.[40]

The privilege applies only to information that is *communicated*.[41] Its purpose is to protect the unrestrained exchange of information between attorney and client. A governmental body therefore must demonstrate that the information constitutes or documents a communication.[42]

The communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body.[43] The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body.[44] Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. So the mere fact that a communication involves an attorney for the government does not demonstrate this element. The governmental body is, therefore, obligated to inform this office of the attorney's or representative's role with regard to each communication at issue. Such explanation should appropriately include a

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[38]We acknowledge the concern that comments submitted to this office pertaining to the communications a governmental body seeks to protect may reveal the content of such communications. Where this is a concern, a governmental body may submit such comments in a separate brief, marked as confidential. To the extent such comments reveal the information at issue, this office is prohibited from disclosing the comments. *See* TEX. GOV'T CODE § 552.304.

[39]*In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex. App.—Waco 1999, orig. proceeding) (the mere listing of the privilege in a response or privilege log does not prove that privilege; proof of the facts that justify the claim of privilege is necessary).

[40]*See* TEX. R. EVID. 503.

[41]*See id.* 503(a)(5), (b)(1).

[42]In this respect, the attorney-client privilege is sometimes confused with the work product privilege. Information need not have been *communicated* to constitute work product. *See* TEX. R. CIV. P. 192.5; *see also* Open Records Decision No. 647 (1996).

[43]TEX. R. EVID. 503(b)(1).

[44]*In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney), *mand. denied*, 12 S.W.3d 807 (Tex. 2000).

description of the nature of the professional legal services to which each communication pertains and how such legal services are for the client governmental body.[45]

The privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.[46] Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Absent such information, this office cannot necessarily assume that the communication was made only among the categories of individuals identified in rule 503, and the governmental body will thereby have failed to demonstrate the privilege.[47]

A "representative of the client" is either: 1) "a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client,"[48] or 2) "any person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."[49] Individuals meeting the first definition are members of the client entity's "control group," which is typically limited to "upper echelon" employees.[50] The second definition incorporates the "subject matter test" for determining who qualifies as a client representative.[51] A Texas court of appeals states:

> Under the subject matter test, an employee's communication is deemed to be that of the corporation/client if: the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with

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[45]*See, e.g., Harlandale I.S.D. v. Cornyn*, 25 S.W.3d 328.

[46]TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E).

[47]*See, e.g., In re Monsanto Co.*, 998 S.W.2d at 933 (attorney-client privilege did not apply to report that did not identify author or recipient).

[48]TEX. R. EVID. 503(a)(2)(A).

[49]*Id.* 503(a)(2)(B); *see also Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197-198 (Tex. 1993).

[50]*Nat'l Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F.Supp.2d 804, 806 (N.D.Tex. 2001).

[51]Prior to March 1, 1998, Texas employed only the "control group" test. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 198-99; *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. Civ. App.—Waco 1997, no writ). Effective March 1, 1998, the subject matter test was added. *See* TEX. R. EVID. 503(a)(2)(B); *In re Monsanto Co.*, 998 S.W.2d at 922. The scope of the subject matter test has been considered by federal courts since 1970. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 197-98; *Upjohn Co. v. US*, 449 U.S. 383 (1981).

> in the communication is the performance by the employee of the duties of his employment.

In re Monsanto Co., 998 S.W.2d at 922. In applying this test, the court further explained:

> We recognize that it might be argued that all communications between corporate representatives could be claimed as privileged on the basis that "the legal department can better represent us if we keep them informed." We reject that assertion. We do not believe that it is necessary for the legal department to be advised of every development out in the field, no matter how minute. Thus, we applied *common sense* to the contents of the documents.

Id. at 930 (emphasis added). Thus, a governmental body may not properly claim the privilege for all manner of communications between its employees. Rather, much depends on the purpose or purposes of the communication. The communication must be shown to be to, from, or between representatives of the client governmental body, made for the purpose of effectuating legal representation for it, and the subject matter must pertain to the performance by each client representative of the duties of his or her employment. The communication itself may demonstrate these factors, but often they are not revealed in the information itself. In such instances, the governmental body must provide this office explanatory information.

A "representative of the lawyer" is either: 1) "one employed by the lawyer to assist the lawyer in the rendition of professional legal services," or 2) "an accountant who is reasonably necessary for the lawyer's rendition of professional legal services."[52] The first definition includes, for example, a private investigator hired by the attorney to assist the attorney in providing professional legal services.[53] But where a communication is shown on its face to have been shared with such an outside party, the governmental body must explain how the individual qualifies as a representative of the lawyer or client. Absent such an explanation, this office cannot assume that a communication to an outside party is privileged. As for the second definition, notably, communications with an accountant *for the purposes of obtaining accounting services* are not protected by the attorney-client privilege. Rather, such communications must be for the purpose of facilitating the *lawyer's* rendition of professional legal services to the client governmental body.[54] Thus, this office must be provided an explanation of the purpose and circumstances of communications involving an accountant in order to assess whether the attorney-client privilege applies.

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[52]TEX. R. EVID. 503(a)(4)(A), (B).

[53]*Bearden v. Boone*, 693 S.W. 2d 25, 28 (Tex. App.—Amarillo 1985, orig. proceeding).

[54]Steven Goode & M. Michael Sharlot, *Article V: Privileges*, 30 Hous. L. Rev. 489, 521 (1993).

Sometimes the information at issue is indicated on its face to have been communicated among attorneys for and representatives of *different* governmental bodies as clients, or involving a non-governmental body as client. This does not necessarily mean that the privilege does not apply, but in such instances the communication must have been made "in a pending action and concerning a matter of common interest" to the respective clients.[55] But absent an explanation of the action to which the communication at issue pertains, whether the communication was made when the action was pending, and how the communication concerns a matter of common interest to the involved clients, this office cannot assume that the communication is subject to the protection of the privilege.

The attorney-client privilege applies only to a *confidential* communication,[56] meaning it was "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."[57] A governmental body must demonstrate to this office that each communication at issue meets this definition. Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated.[58] Such intent may be inferred from the circumstances, and an indication of such intent may be reflected in the communication itself.[59] But such intent may not be revealed in the communication itself, in which case the governmental body should make appropriate representations to this office that relate to the intent of those involved in each communication at the time the information was communicated.[60] Such representations would be especially important when, for example, it is unclear on the face of the communication whether the persons involved are limited to attorneys, clients, and representatives of either, as defined in Rule 503.[61]

Because the client may elect to waive the privilege at any time, each communication must also have remained confidential. Thus, for example, where a document, record, or fee bill entry is indicated to have been voluntarily disclosed to an opposing party, the attorney-client

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[55]TEX. R. EVID. 503(b)(1)(C), (d)(5).

[56]*Id.* 503(b)(1).

[57]*Id.* 503(a)(5).

[58]*Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ).

[59]*See, e.g., In re Carbo Ceramics Inc.*, 81 S.W.3d 369, 374 (Tex. App.—Houston [14th Dist.] 2002).

[60]*See, e.g., Lewis v. State*, 709 S.W.2d 734, 736 (Tex. App.—San Antonio 1986, pet. ref'd, untimely filed) (attorney-client privilege waived where communication was in presence of individuals who, at the time, had interests adverse to client).

[61]*See* TEX. R. EVID. 503(a)(1)-(4).

privilege has generally been waived.[62] Especially in instances where there are indications of disclosure subsequent to the communication, a governmental body should inform this office how the confidentiality of the communication has been maintained.

APPLYING THE ATTORNEY-CLIENT PRIVILEGE UNDER THE ACT

The attorney-client privilege in the context of the open records ruling process presents certain additional considerations that are not present in the discovery context. Next, we address an assertion of the privilege in relation to section 552.302 of the Government Code. We then conclude by addressing the privilege with respect to section 552.301(a) of the Government Code.

If a governmental body fails to properly comply with section 552.301 of the Government Code, section 552.302 provides that the information "must be released unless there is a compelling reason to withhold the information." This office has long held that a "compelling reason" is demonstrated only if the information is confidential by law — meaning section 552.352 prohibits the governmental body from releasing it — or if the release of the information implicates third party interests.[63]

As previously noted, although Texas Rule of Evidence 503 employs the term "confidential," a governmental body as client has the discretion to waive its "confidentiality" interest in its attorney-client privileged communications and release such information requested under the Act. And a governmental body's voluntary release of the information does not implicate section 552.352, the provision under the Act imposing criminal penalties for releasing confidential information. Thus, notwithstanding Rule 503's use of the term "confidential" and section 552.107(1)'s reference to the rule, neither the exception nor the rule makes information confidential in the sense that the governmental body is thereby *prohibited* from releasing the information. A governmental body may in its discretion assert section 552.107(1) for information that is not subject to section 552.022, or Texas Rule of Evidence 503 for information that is subject to section 552.022, but it may also choose to release the information instead.[64] Accordingly, neither type of assertion demonstrates a "compelling reason" under section 552.302 as prohibiting the governmental body's release of the information.

In Open Records Decision No. 630 (1994), this office concluded that the attorney-client privilege does not under any circumstances demonstrate a compelling reason under

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[62]*See, e.g.*, Open Records Decision No. 658 at 7 (1998) (section 552.107(1) did not except from disclosure a governmental body's mediated final settlement agreement, which the opposing party had signed).

[63]*See, e.g.*, Open Records Decision No. 150 (1977).

[64]*See* TEX. GOV'T CODE § 552.007.

section 552.302.[65] However, as noted above, a separate basis for demonstrating a compelling reason is that the release of the information implicates third party interests.[66] Thus, a compelling reason under section 552.302 may be demonstrated for attorney-client privileged communications *if it is shown that the release of the information would harm a third party.* Harm to the interests of the governmental body that received the request is not a compelling reason. When section 552.302 is triggered, the governmental body carries the burden of demonstrating a compelling reason, and this office must decide the issue on a case-by-case basis. Open Records Decision No. 630 is overruled to the extent it conflicts with this conclusion.

Section 552.301(a) requires a governmental body, absent a "previous determination," to request a decision from this office anytime it seeks to withhold responsive information under the Act.[67] In Open Records Decision No. 673 (2001), we announced the criteria for a decision from this office to constitute such a previous determination. Prior to that decision and without analysis, guidance, or discussion, a Texas Court of Appeals in 1999 opined that Open Records Decision No. 574 constituted a previous determination on which the governmental body in that case could rely, and that the governmental body therefore was not required to seek a decision from this office.[68] Among the criteria announced in Open Records Decision No. 673 for such a previous determination is the requirement that the decision explicitly provide that, in response to future requests, the governmental body is not required to ask this office in order to withhold the type of information at issue.[69] Open Records Decision No. 574 does not meet this requirement. Absent a previous determination as defined in Open Records Decision No. 673, a governmental body must request a ruling from this office if it wishes to withhold information based on a claim of attorney-client privilege.[70] Governmental bodies are thus cautioned against using the *Hart* case as a basis for withholding information from the public under the Act without seeking a decision from this office.

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[65]Open Records Decision No. 630 at 6 (1994).

[66]*See, e.g.*, Open Records Decision No. 586 (1991) (although discretionary exception, need of another governmental body to withhold information subject to the exception demonstrated a compelling reason under predecessor to section 552.302).

[67]*See* TEX. GOV'T CODE § 552.301(a); *see also* Open Records Decision No. 673 (2001).

[68]*Hart v. Gossum*, 995 S.W.2d at 963.

[69]*See* Open Records Decision No. 673 at 7-8 (2001) (criteria for previous determinations of the second type).

[70]*See also* TEX. GOV'T CODE § 552.326 (prohibiting an assertion of section 552.107(1) in a suit filed under the Act unless the exception was properly asserted in this office's open records ruling process).

SUMMARY

The attorney-client privilege is properly asserted under section 552.107(1) of the Government Code, which excepts from required public disclosure a client governmental body's privileged communications, as defined in Texas Rule of Evidence 503. The exception will generally apply to an entire communication, except in the case of attorney fee bills. Although an assertion of section 552.107(1) or Texas Rule of Evidence 503 is discretionary and a governmental body client may thus release the information in lieu of asserting the privilege, a successful assertion of the attorney-client privilege may nevertheless demonstrate a compelling reason under section 552.302 of the Government Code where release of the information implicates third party interests. Whether a compelling reason is demonstrated must be decided by this office on a case-by-case basis. The applicability of the attorney-client privilege to information requested under the Act also must be decided by this office on a case-by-case basis.

Yours very truly,

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