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October 14, 2020

Via U.S. Mail

Mr. Justin Gordon, Division Chief
Office of the Attorney General of Texas—Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Requests from **Ken Martin** received on **July 29, 2020**¹—Request for Ruling and Supplemental Brief

Dear Mr. Gordon:

Pursuant to the Texas Public Information Act (“PIA”), Travis County Healthcare District d/b/a Central Health (“Central Health”) received two requests from the same requestor for records documenting a specified “oral complaint” and for the results of a specified investigation, both involving a former Central Health employee and a named Central Health official. Central Health will withhold the recording of a closed meeting under Government Code section 552.101 in conjunction with section 551.104 of the Open Meetings Act.² Central Health has determined the remaining responsive information is excepted from required disclosure under Government Code sections 552.103 and 552.107. Accordingly, we request an Attorney General decision pursuant to section 552.301 of the Government Code. Our written comments stating the reasons the raised exceptions apply are set out below. The relevant requested information is enclosed.³

By copy of this letter we are informing the requestor that Central Health wishes to withhold the responsive information and has asked for a decision from the Attorney General.

¹ Pursuant to guidelines issued by the Texas Attorney General’s Office, the calculation of a governmental body’s 10- and 15-business day deadlines for responding to requests under the Public Information Act does not include any calendar days upon which a governmental body’s administrative offices are closed or operating with only a skeleton crew, or the governmental body’s records cannot be accessed because its staff is either working remotely or is directly involved in the public health or epidemic response. On March 13, 2020, the Governor declared a state of disaster in Texas due to COVID-19. On March 24, 2020, Travis County Judge Sarah Eckhardt signed a shelter-in-place order for Travis County. In response to these pronouncements, the employees of Central Health and the Travis County Attorney’s Office (“TCAO”) that are responsible for responding to PIA requests have been assigned to work remotely, with limited access to County records, and Central Health’s work is directly involved in public health and the pandemic response. Consequently, Central Health’s and TCAO’s ability to respond to PIA requests has been delayed.

² Open Records Decision 684 allows the withholding of a certified agenda and tape of a closed meeting pursuant to section 551.104 without submitting the information for a ruling from the Attorney General.

³ Central Health has determined the submitted information is responsive to both requests.

The submitted information consists of privileged attorney-client communications excepted from disclosure under Government Code section 552.107 and Texas Rule of Evidence 503.

Government Code section 552.107(1) protects information covered by the attorney-client privilege. 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. Open Records Decision No. 676 at 6–7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Tex. R. Evid. 503(b)(1). 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. *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).

Thus, a governmental body must inform your office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), 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.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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).

Finally, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, Rule of Evidence 503 can protect a privileged attorney-client communication that is also a completed report within the meaning of section 552.022. Upon a demonstration of the three factors set out above, the entire communication is confidential under Rule 503 provided 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); *see also 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).

The submitted memorandum consists of a communication between attorneys with the Travis County Attorney’s Office (“TCAO”) and Central Health CEO Mike Geeslin. It documents an investigation conducted by TCAO attorneys at the request of client Mike Geeslin for the purpose of providing professional legal services and advice to Central Health. The memorandum was intended

to be kept confidential and that confidentiality has been maintained. Accordingly, Central Health wishes to withhold this privileged communication pursuant to Government Code section 552.107 and Texas Rule of Evidence 503.

We request your determination as to whether the submitted information may be withheld from the requestor. If you have any questions, please contact me at (512) 854-9642, or by e-mail at matthew.entsminger@traviscountytx.gov.

Sincerely,



Matthew R. Entsminger
Assistant County Attorney

Enclosures: Requests; information at issue

c: Briana Yanes
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(via email, without enclosures)

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