



August 13, 2001

Mr. Brendan Hall
City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2001-3530

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150060.

The City of Harlingen (the "city") received a request for a specified report and "any and all copies of directives and/or regulations regarding take home vehicles (marked or unmarked) and the on-call status of the Harlingen Police Dept." You have not submitted any information responsive to the second part of the request, nor have you made any arguments against disclosure of such information. Therefore, we assume that the city has already released all information responsive to the second part of the request. You claim that the specified report is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as Texas Rule of Civil Procedure 192.3(e) and Texas Rule of Evidence 503(a)(5), (b)(1). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by the requestor. Gov't Code §552.304.

You inform us that the report at issue was previously the subject of a ruling from this office in Open Records Letter No. 99-0378 (1999). Open Records Decision No. 673 (2001) (To the extent that the elements of law, fact, and circumstances have not changed from those existing when the prior ruling issued, government body may rely on the previous ruling regarding that same information.) However, the Seventy-sixth Legislature amended section 552.022 of the Government Code, changing the law that was in effect when this

office issued the prior ruling. Act of June 18, 1999, 76th Leg., R.S., ch. 1319, §5, 1999 Tex. Gen. Laws 4501. Therefore, the city may no longer rely on the previous ruling.

The report at issue is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. One such category is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code §552.022(a)(1). You do not contend that the report is subject to section 552.108. The report must be released under section 552.022 unless the information is expressly made confidential under other law.

Although you claim that section 552.101 applies to the submitted information, you do not explain why. Conclusory assertions that a particular exception applies to requested information will not suffice. If the city does not establish how and why an exception applies to the requested information, this office has no basis on which to pronounce it protected. Open Records Decision No. 363 (1983).

You state that sections 552.103, 552.107, and 552.111 apply to the submitted information. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); 473 (1987) (governmental body may waive section 552.111).

You also claim that the submitted information is excepted from disclosure under Rule 192.3 of the Texas Rules of Civil Procedure and Texas Rule of Evidence 503(a)(5), (b)(1). However, subsection 552.301(b) of the Government Code provides:

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

It appears from the documents submitted to this office that the city received the request for information on May 15, 2001. You did not claim that Texas Rule of Civil Procedure 192.3 and Texas Rule of Evidence 503 were applicable exceptions until June 1, 2001. Consequently, you failed to raise these privileges within the ten business day period mandated by section 552.301(b) of the Government Code. Because the exceptions were not timely stated, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). In view of our determination that the asserted privileges do not apply, as discussed below, it is unnecessary for us to reach the question of whether the applicability of a privilege is compelling.

Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). The attorney-client privilege is found in Rule 503 of the Texas Rules of Evidence. 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 for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if 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. Tex. R. Evid. 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. Upon

a demonstration of all three factors, the document containing privileged information is 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You have not identified the author of the report as an attorney, nor have you shown that the requirements of Rule 503 have been met. Therefore, we cannot conclude that the report is confidential pursuant to Texas Rule of Evidence 503.

Texas Rule of Civil Procedure 192.3 protects from discovery “[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert.” Tex. R. Civ. P. 192.3(e). You inform us that the author of the report is a consulting expert employed by the city. You do not advise whether he is a testifying expert, or that his work has not been reviewed by a testifying expert. You have failed to show that the requirements of Rule 192.3(e) have been met. Therefore, we cannot conclude that the report is confidential pursuant to Rule 192.3(e). Accordingly, the submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref.: ID# 150060

Enc.: Submitted documents

c: Mr. Dennis M. Zamarron
113 West Davis
Harlingen, Texas 78550
(w/o enclosures)