



September 18, 2002

Mr. Vic Ramirez
Associate General Counsel
LCRA
P.O. Box 220
Austin, Texas 78767-0220

OR2002-5248

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168796.

The Lower Colorado River Authority (the "LCRA") received a request for six categories of information pertaining to the Morgan Creek-Comanche transmission line project. The requestor subsequently narrowed Item E of his request to exclude attorney and appraiser invoices. You state that the LCRA will provide the requestor with information responsive to Items B, C, E and F of the request. You claim that a portion of the requested information is excepted from disclosure under sections 552.103, 552.104, 552.107, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the submitted documents contain information that falls within the purview of section 552.022 of the Government Code, which provides in pertinent part as follows:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(5), (a)(16). The submitted information in Exhibit C falls within the scope of subsection (5) of section 552.022(a). With regard to the submitted fee bill in Exhibit D, we note that the fee bills are subject to the purview of section 552.022(a)(16).

You contend that sections 552.103 and 552.107 of the Government Code except this information from disclosure. However, sections 552.103 and 552.107 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 section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Thus, sections 552.103 and 552.107 are inapplicable to the information that is subject to the purview of section 552.022(a).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. 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*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information at issue is excepted under Rule 503.

Texas Rule of Evidence 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.

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 in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Thus, 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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

Based on our review of your arguments and the submitted documents, we conclude that you have demonstrated that a portion of the attorney billing statement in Exhibit D is encompassed by the attorney-client privilege and, therefore, may be withheld from disclosure pursuant to rule 503 of the Texas Rules of Evidence. We have marked the information the LCRA may withhold under rule 503.

You claim that the remaining information subject to the purview of section 552.022(a) is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). You have failed to provide any information to indicate that a competitive bidding situation exists in this instance. You have also failed to show some actual or specific harm in a particular competitive situation. Thus, we find that section 552.104 is not applicable to the information at issue. We therefore conclude that the LCRA may not withhold any portion of the information in Exhibit C or the attorney fee bill in Exhibit D from disclosure pursuant to section 552.104 of the Government Code.

The LCRA also contends that the information subject to section 552.022 is excepted from disclosure under section 552.133 of the Government Code. Section 552.133 excepts from disclosure information held by a public power utility that is related to a competitive matter. *See* Gov’t Code § 552.133(b). Section 552.133(a)(3) defines “competitive matter” as a matter that the public power utility governing body determines by a vote in good faith to be related to the public power utility’s competitive activity and which, if disclosed, would give advantage to competitors or prospective competitors. *See id.* § 552.133(a)(3). However, section 552.133(a)(3) also provides that thirteen categories of information may not be deemed to be competitive matters. *See* Gov’t Code § 552.133(a)(3). The attorney general

may conclude that section 552.133 is inapplicable to requested information only if, based on the information provided, he determines that the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *See id.* § 552.133(c). Furthermore, section 552.133(b) provides:

Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b).

Based on our review of your arguments and the information at issue, we find that the LCRA has failed to sufficiently demonstrate that the information subject to the purview of section 552.022(a) reasonably relates to any "competitive matter" that the LCRA has determined by a vote in good faith to be related to the public power utility's competitive activity and which, if disclosed, would give advantage to competitors or prospective competitors. Accordingly, we conclude that the LCRA may not withhold any portion of the information in Exhibit C or the attorney fee bill in Exhibit D from disclosure pursuant to section 552.133 of the Government Code. Consequently, the LCRA must release the entirety of the information in Exhibit C and the remaining portion of the attorney fee bill in Exhibit D to the requestor.

You claim that the remaining document in Exhibit D is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You have provided this office with a copy of the Plaintiff's Original Petition in Cause No. 3601, *LCRA Transmission Services v. Phillip L. Hartgrove, Della T. Hartgrove, Mae Hartgrove Rose and Brady Land Bank FLCA*. You advise us that this cause is currently pending in the 119th District Court, Concho County, Texas. Based upon your assertions and our review of the submitted document, we find that the information at issue is related to the pending litigation. Thus, the LCRA has met both prongs of the test. We have marked the information in Exhibit D that may be withheld from public disclosure under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further,

the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we have marked the information in Exhibit D that may be withheld from public disclosure under section 552.103. The marked portions of the attorney fee bill in Exhibit D may be withheld under rule 503. The remaining submitted information must be released to the requestor.

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).

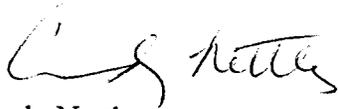
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If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 168796

Enc. Submitted documents

c: Mr. John E. Kinney
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(w/o enclosures)