ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2004

Mr. Frederick D. Schraub
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2004-0238

Dear Mr. Schraub:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194094.

The San Antonio Housing Authority ("the authority"), which you represent, received a request for information relating to the billings of attorneys or law firms retained, hired, or contracted by the authority within a specified time interval. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.[1]

We first note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

> 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:
>
> . . .

[1]This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the authority to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

> (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)(16). In this instance, the information at issue is contained in the authority's attorney fee bills. The authority must release this information under section 552.022(a)(16) unless it is expressly confidential under other law. The authority seeks to withhold portions of the submitted information under sections 552.101, 552.103, and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived.[2] As such, these sections are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the authority may not withhold any of the submitted information under sections 552.103 or 552.107.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure 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). The authority claims that some of the submitted information is protected by the attorney-client privilege under section 552.107.[3] The attorney-client privilege also is found at Texas Rule of Evidence 503. Therefore, we will consider whether any of the information that the authority seeks to withhold under the attorney-client privilege is confidential under rule 503.

Texas Rule of Evidence 503 provides as follows:

> 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;

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[2]*See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); 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 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived).

[3]We note that the authority also invokes the attorney work product privilege, which is encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 677 (2002). Although the authority raised section 552.111 in its initial request for this decision, it has submitted no arguments under section 552.111 with regard to the information at issue. Therefore, we do not consider whether the attorney-client privilege is applicable to any of the information that the authority seeks to withhold. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

> (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. *Id.* 503(a)(5). Thus, 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 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

We understand the authority to claim that portions of the requested attorney fee bills are protected by the attorney-client privilege. You have not demonstrated, however, that any of the information at issue comes within the scope of Texas Rule of Evidence 503. *See* Open Records Decision No. 676 at 5-11 (2002). Therefore, the authority may not withhold any of the information at issue under rule 503.

The authority also raises section 552.101 of the Government Code. This section excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that some of the submitted information is confidential under provisions promulgated by the federal Equal Employment Opportunity Commission (the "EEOC") under the federal Privacy Act, section 552a of title 5 of the United States Code.[4] We note, however, that these federal regulations are applicable to records maintained by the EEOC, rather than to any records held by or on behalf of the

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[4]We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor to Gov't Code § 552.101).

authority. *See* 29 C.F.R., subtitle B, chapter XIV, parts 1610 (availability of EEOC records), 1611 (Privacy Act regulations); *see also* Open Records Decision Nos. 245 (1980), 155 (1977). Therefore, none of the information that the authority seeks to withhold is excepted from disclosure under section 552.101 of the Government Code in conjunction with the EEOC regulations. As the authority raises no other exception to the disclosure of any of the information at issue, all of that 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).

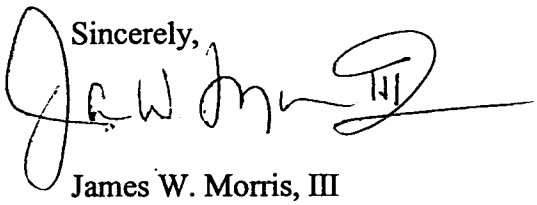
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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 Dep't of Pub. 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 194094

Enc: Submitted documents

c: Mr. Ron Wilson
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(w/o enclosures)