



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2005

Mr. James A. Martinez
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2005-02993

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 221405.

The City of El Paso (the "city") received a request for certain invoices of a law firm representing the city, including those that pertain to "work on the ASARCO air permit renewal and contested case hearing." You claim that the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and protected under Rule 503 of the Texas Rules of Evidence. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor asserts that the city failed to comply with the procedural requirements of section 552.301(d) of the Government Code. Section 552.301(d) requires a governmental body to provide the requestor with (1) a written statement that the governmental body has asked for a decision from the attorney general and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving a request for information. Gov't Code § 552.301(d)(1), (2). The city states that it received the request for information on January 14, 2005. Thus, the ten-business-day deadline for the city to provide the requestor with the information required under section 552.301(d) was January 31, 2005. The requestor states that she received a faxed copy of the city's response

to her request on February 1, 2005; however, the city informs us that it “transmitted its report [to the requestor] and its request to the Attorney General on January 28, 2005.”

The determination of the date on which the city provided the requestor the information required under section 552.301(d) of the Government Code is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the city’s representations that it transmitted the required information to the requestor on January 28, 2005, we conclude that the city complied with section 552.301(d). *See* Gov’t Code § 552.308 (time requirement met if notice bears post office cancellation mark indicating time within ten-day period, or if the governmental body furnishes satisfactory proof that the notice was deposited in the mail within that time period).

Next, we note that the city has previously released some of the submitted information to the requestor. Information that a governmental body has previously released to the public may not be withheld by the governmental body unless it is able to demonstrate that the information is confidential by law. Gov’t Code § 552.007. Although you assert that this information is protected under Texas Rule of Evidence 503 and sections 552.107 and 552.111 of the Government Code, this rule and these exceptions are discretionary and may be waived. As such, they do not make information confidential for purposes of section 552.007. *See id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the city has not demonstrated that any of the previously released information is confidential by law, and it must release that information to the requestor pursuant to section 552.007.

We next note that the remaining submitted information consists of attorney fee bills. Section 552.022 of the Government Code 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: . . . (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). Therefore, information within these fee bills may only be withheld if it is confidential under other law.

Although sections 552.107 and 552.111, as discretionary exceptions, do not make information confidential for purposes of section 552.022, the Texas Supreme Court has held that the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision

Nos. 677 (2002), 676 (2002). Accordingly, we will address whether the submitted information not subject to release pursuant to section 552.007 is excepted under Texas Rule of Evidence 503.

Rule 503(b)(1) of the Texas Rules of Evidence provides the following:

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. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must do the following: (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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or 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, 4527 (Tex. App.–Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You state the submitted documents consist of “communications made between attorneys or by attorneys with their client or authorized representatives of the client for the purpose of facilitating the rendition of professional legal services.” Thus, we understand you to assert that information within the fee bills at issue constitutes privileged attorney-client communications. Having considered your representations and reviewed the information at issue, we find that you have established that some of the submitted information, which we have marked, constitutes privileged attorney-client communications that may be withheld under Rule 503. But we find you have not established that the remaining information constitutes privileged attorney-client communications; therefore, the city may not withhold any of the remaining information under Rule 503.

To conclude, the city may withhold the information we have marked under Texas Rule of Evidence 503. It must release the remaining information at issue pursuant to sections 552.007 and 552.022 of the Government Code.

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).

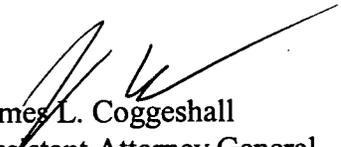
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 221405

Enc. Submitted documents

c: Ms. Vanessa Johnson
Newspaper Tree
1717 North Stanton #F
El Paso, Texas 79902
(w/o enclosures)