



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2006

Ms. Sylvia Borunda Firth
Assistant City Attorney
City of El Paso
#2 Civic Center Plaza
El Paso, Texas 79901

OR2006-06106

Dear Mr. Firth:

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# 251077.

The City of El Paso (the "city") received a request for certain correspondence, memoranda, evaluations, and opinions from a named individual, as well a specified hotel's tax abatement application. You claim that the requested information is excepted from disclosure under sections 552.107, 552.111, and 552.131 of the Government Code, as well as rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted engagement agreement 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:

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted engagement agreement is a contract relating to the expenditure of public funds subject to subsection 552.022(a)(3). The city must release this information unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these are discretionary exceptions that protect the governmental body's interests and may be waived. See Open Records Decision Nos. 676 at 10-11 (2002) (section 552.107 is not other law for purposes of section 552.022), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.107 and 552.111 are not other law that make information confidential for the purposes of section 552.022. However, 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, 336 Tex. 2001). Therefore, we will address your rule 503 arguments with regard to the information subject to section 552.022.

Rule 503 of the Texas Rule of Evidence encompasses the attorney-client privilege and 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. *Id.* 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. *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 argue that the submitted engagement agreement constitutes a communication between city employees and the city's outside counsel. You also argue that the engagement agreement was made for the purpose of facilitating the rendition of professional legal services. You indicate that the engagement agreement has remained confidential. Therefore, based on your representations and our review, we find that you have demonstrated that the engagement agreement is privileged under Texas Rule of Evidence 503 and it may be withheld on that basis.

Next, the city raises section 552.107 of the Government Code for some of the remaining information. This section also protects information coming within 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 Tex. 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this 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*, 922 S.W.2d at 923.

You assert that the documents you have labeled as Exhibits C and D constitute confidential communications between city employees and outside counsel for the city. You state that these communications were made for the purpose of facilitating the rendition of professional legal services and the confidentiality of these communications has been maintained. Therefore, based on your representations and our review, we conclude that the city may withhold Exhibits C and D under section 552.107 of the Government Code.¹

Next, you assert that the submitted tax abatement application is excepted under section 552.131(b) of the Government Code. Section 552.131(b) provides that “[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].” Gov’t Code § 552.131(b). You state that the city is currently engaged in negotiations with the applicant for tax abatement. We note, however, that an application for tax abatement constitutes a proposed incentive requested by the applicant. Section 552.131(b) only excepts those incentives offered to the business prospect by a governmental body or another person, it does not except incentives requested by the business prospect. We, therefore, conclude that the city has failed to demonstrate the applicability of section 552.131(b) to the tax abatement application and it may not be withheld on that basis.

We note that the submitted tax abatement application contains an e-mail address. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail address we have marked in accordance with section 552.137 unless the city receives consent for its release.

¹As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure for this information.

In summary, the submitted engagement agreement may be withheld under rule 503 of the Texas Rules of Evidence. The city may withhold Exhibits C and D under section 552.107 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code. The remaining 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).

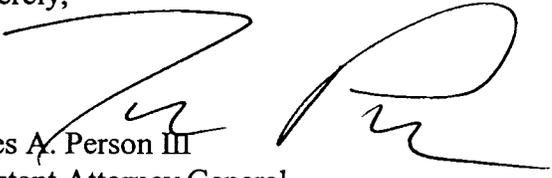
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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,


James A. Person III
Assistant Attorney General
Open Records Division

JAP/ir

Ref: ID# 251077

Enc. Submitted documents

c: Mr. Sito Negron
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(w/o enclosures)