



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2009

Ms. Julie Fort
Strasburger & Price, L.L.P.
2801 Network Boulevard, Suite 600
Frisco, Texas 75034

OR2009-03957

Dear Ms. Fort:

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# 338201.

The Plano Economic Development Board, Inc. (the "board"), which you represent, received a request for the contract between the board and its outside tax attorney and all related documents or communications. You contend that the board is not a "governmental body" subject to the Act. Alternatively, you claim that the requested information is excepted from disclosure under section 552.107 of the Government Code. We have considered your claims and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We begin by addressing your assertion that the board is not a governmental body, and therefore its records are not subject to the Act. Under the Act, the term "governmental body" includes several enumerated kinds of entities and "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds[.]" *Id.* § 552.003(1)(A)(xii). The phrase "public funds" means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5). This office has previously ruled that the board constitutes a governmental body under section 552.003(1)(A)(xii) with respect to the services it performs under its contract with the City of Plano (the "city"). *See* Open Records Letter Ruling No. 2007-16399 (2007). However, as you note, in certain instances, based on our

examination of the specifics of a situation, this office will find that only records related to those parts of an entity directly supported by public funds are subject to the Act. *See* Open Records Decision No. 602 at 5 (1992) (determining that records of Dallas Museum of Art pertaining to private collection of artwork for which City of Dallas had provided no direct support were not subject to Act).

In exploring the scope of the definition of "governmental body" under the Act, this office has distinguished between private entities that receive public funds in return for specific, measurable services and those entities that receive public funds as general support. *See* Open Records Decision No. 228 (1979) (finding that private, nonprofit corporation chartered for purpose of promoting interests of Dallas-Fort Worth metropolitan area was governmental body). In support of your claim that the board is not a governmental body and the requested information is not subject to the Act in this instance, you direct our attention to the lists of specified services to be performed in the current contract between the city and the board.

Upon review, we find that the submitted information, including the lists of specified services to be performed, concerns matters related to the economic development activities the board performs for the city. The submitted information also demonstrates the closeness of the relationship between the city and the board and the nature of the general support provided by the city to the board. Furthermore, the contract provisions demonstrate that the city exercises considerable control over the funds paid to the board under the contracts. Thus, the contracts and other submitted information indicate that the city provides general support for the operation of the board and that the city and board share a common purpose and objective, namely the economic development of the city. *See Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988); Open Records Letter Ruling No. 2007-16399 (2007).

Based on the totality of these facts, we conclude that the board, in its entirety, constitutes a governmental body within the meaning of section 552.003 and that all of the requested information is subject to the Act. *See* Open Records Decision No. 621 at 5 (1993) (determining that entire Arlington Economic Development Foundation constitutes governmental body where such foundation had received both city funding and private contributions). Accordingly, we will address the exception to disclosure you have raised pursuant to section 552.301 of the Government Code.

Next, we note that the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

- (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:

(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 information consists of an engagement letter between the board and its tax attorney which concerns the expenditure of funds by a governmental body, making it subject to section 552.022(a)(3) of the Government Code. Although you raise section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* 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 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the board may not withhold the submitted information under section 552.107.

The Texas Supreme Court has held, however, 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). The attorney-client privilege is also found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503, which 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;
- (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).

You state that the submitted information consists of a communication between the board and its attorney. You also state that this communication was made in confidence, in furtherance of the rendition of professional legal services to the board, and that the communication has remained confidential. Based on your representations and our review, we find that you have demonstrated the applicability of the attorney-client privilege to the submitted information. Accordingly, the board may withhold the submitted information on the basis of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 338201

Enc. Submitted documents

c: Requestor
(w/o enclosures)