



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2009

Ms. Cristina R. Blanton
Bovey & Bojorquez, LLP
Town of Horizon City
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2009-08726

Dear Ms. Blanton:

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# 346904.

The Town of Horizon City (the "town"), which you represent, received a request for (1) payments by the town to a named law firm and (2) all correspondence between specified town employees and the named law firm. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted information includes public notices of a special meeting of the town's city council. Notices of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the town must release the submitted notices of public meetings pursuant to section 551.041 of the Government Code.

We also note that the submitted information includes two copies of the town charter. This office has ruled where compelling public policy based on constitutional considerations or law outside the Act requires public access to information, its relationship to litigation cannot

justify withholding it. See Open Records Decisions Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”), 146 (1976) (election returns), 43 (1974) (information made public by statute). This policy is based on the concept of due process which requires the people have notice of the law. *Bldg. Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). Thus, the copies of the town charter, which the town had adopted, must be disclosed.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(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;

...

(16) information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege;

(17) information that is also contained in a public court record[.]

Gov’t Code § 552.022(a)(3), (a)(16), (a)(17). The submitted information includes engagement letters between the town and the named law firm and information in an account, voucher, or contract relating to the expenditure of funds by a governmental body that fall within the purview of section 552.022(a)(3). Moreover, the submitted information includes attorney fee bills that are subject to section 552.022(a)(16) and court-filed documents, which are subject to section 552.022(a)(17). You raise sections 552.103 and 552.107 for the submitted information that is subject to section 552.022. Sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body’s interests and may be waived. 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 section 552.103); see also 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). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the town may not withhold any of the submitted information that is subject to section 552.022 under section 552.103 or section 552.107. 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). The attorney-client privilege also is found

at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the information that is subject to section 552.022. We note that a portion of the information subject to section 552.022 may be excepted from disclosure under section 552.136 of the Government Code.¹ Thus, we will also consider the applicability of this exception to the documents that are subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides, in relevant part:

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 pursuant to rule 503, a governmental body must: (1) demonstrate 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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). *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, 457 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You contend that a portion of the attorney fee bills subject to section 552.022, which you have marked, consist of confidential communications between the town's legal counsel and town employees made for the purpose of facilitating the rendition of professional legal services to the town. Upon review, we agree some of the information at issue, which we have marked, constitutes privileged attorney-client communications that the town may withhold under rule 503. However, we conclude you have not demonstrated that the remaining information at issue consists of privileged attorney-client communications. Therefore, the town may not withhold any of the remaining information that is subject to section 552.022 of the Government Code under rule 503.

The documents subject to section 552.022(a)(3) also contain information protected from public disclosure under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
- or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Upon review, we find that the account and routing numbers we have marked are access device numbers for the purposes of section 552.136. Accordingly, the town must withhold the marked information pursuant to section 552.136 of the Government Code.

You claim that the remaining information not subject to section 552.022 of the Government Code is excepted from disclosure under section 552.103 of the Government Code, which provides in part 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.

Gov't Code § 552.103(a), (c). A 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 was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the town's receipt of this request, a lawsuit styled *Donald Smasal Sr. v. Walker L. Miller*, was filed and is currently pending in the 243rd District Court of El Paso County, Texas. Further, you explain the submitted information is directly related to the pending litigation because it pertains to the plaintiff's claim, which opposes the eligibility of a named mayoral candidate. Based on your representations and the submitted information, we agree that you have shown litigation was pending when the town received the request for information. We also agree that some of the remaining information not subject to section 552.022 is related to the anticipated litigation. We therefore conclude that section 552.103 of the Government Code is applicable to the information we have marked. We find, however, that you have failed to demonstrate how any of the remaining information is related to the plaintiff's claim of ineligibility. Accordingly, none of the remaining information may be withheld under section 552.103.

We note, however, that the opposing party in the pending litigation appears to have seen or had access to some of the information at issue, such as the submitted oaths of office. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing

party in the pending litigation has seen or had access to the information at issue, any such information is not protected by section 552.103 and may not be withheld on that basis. Furthermore, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982).

In summary, the town must release the submitted public notices of a special meeting and copies of the town charter. The information subject to section 552.022 must be released; however, in releasing these documents, the town may withhold the information we have marked under rule 503 of the Texas Rules of Evidence and must withhold the information we have marked under section 552.136 of the Government Code. The town may withhold the information we have marked under section 552.103, to the extent it has not already been seen by the opposing party. The remaining information must be released.

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 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 346904

Enc. Submitted documents

cc: Requestor
(w/o enclosures)