



January 9, 2015

Ms. Elizabeth Elleson
Counsel for the City of Westlake Hills
Bojorquez Law Firm, P.C.
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2015-00442

Dear Ms. Elleson:

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# 550246.

The City of Westlake Hills (the "city"), which you represent, received a request for twenty-seven categories of information.¹ You state you have released some responsive information to the requestor. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, and 552.107 of the Government Code.² You also state release of the requested information may implicate the proprietary interests of a third party. Accordingly, you state you notified the third party of the request for information and of its right to submit arguments to this office as to why the submitted

¹We note the city sought and received clarification of this request from the requestor. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). Additionally, you inform us the requestor paid a deposit pursuant to section 552.263 of the Government Code on October 20, 2014. *See* Gov't Code § 552.263(e) (request considered received on date governmental body receives required deposit).

²Although you raise sections 552.104 and 552.153 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claims these sections apply to the requested information. *See* Gov't Code §§ 552.301, .302.

information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.

Initially, we note the city did not submit for our review information responsive to categories ten through thirteen of the request. Although you assert the city submitted a representative sample of information responsive to categories nine through thirteen, upon review, we find the submitted information is not representative of categories ten through thirteen. Accordingly, we must address the city's procedural obligations under the Act for this information.

Section 552.301(e) of the Government Code requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. Gov't Code § 552.301(e)(1). As of the date of this letter, the city has submitted a representative sample of some of the requested information but not information responsive to categories ten through thirteen. Consequently, we find the city failed to comply with the requirements of section 552.301 with respect to categories ten through thirteen.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-81 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). Although you assert the information responsive to categories ten through thirteen is excepted from release under sections 552.105 and 552.107 of the Government Code, these sections are discretionary in nature and serve only to protect a governmental body's interests. As a result, the city's claims under these sections are not compelling reasons to overcome the presumption of openness for the information at issue. *See* Open Records Decision Nos. 676 at 10-11 676 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 663 at 5 (1999) (waiver of discretionary exceptions). We also note the administrative inconvenience of providing public records is not grounds for refusing to comply with the mandates of the Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). Thus, the city may not withhold the information

responsive to categories ten through thirteen under section 552.105 or 552.107 of the Government Code. Although the city also raises section 552.101 of the Government Code, which is a mandatory exception to disclosure, because you have not submitted the information at issue for our review, we have no basis for finding any of it excepted from disclosure or confidential by law. Thus, we have no choice but to order the information responsive to categories ten through thirteen released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

Next, we note the submitted information is subject to 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 unless made confidential under this chapter or 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 information relating to the receipt or expenditure of public funds by the city, which is subject to section 552.022(a)(3) of the Government Code. The city must release the submitted information under section 552.022(a)(3) unless it is made confidential under the Act or other law. Although you raise sections 552.103, 552.105, and 552.107 of the Government Code, these exceptions are discretionary in nature and do not make information confidential under the Act. *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); *see also* ORDs 676 at 10-11, 665 at 2 n.5, 564, 663 at 5. Therefore, none of the submitted information may be withheld under these sections. However, we note the Texas Supreme Court has held 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). Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. Additionally, because section 552.101 of the Government Code excepts from disclosure information made confidential under law, we will address your argument under this section for the submitted information. Furthermore, because third-party interests can provide a compelling reason to withhold information, we will consider whether any of the information is confidential on that basis.

Texas Rule of Evidence 503 encompasses the attorney-client privilege, providing 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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The city states some of the submitted information consists of communications involving city attorneys and city officials. We understand the city to assert the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find the city has established

the information we have marked constitutes attorney-client communications under rule 503. Thus, the city may withhold the information we have marked under Texas Rule of Evidence 503.³ However, some of the remaining communications are with individuals the city has not demonstrated are privileged parties. Thus, we find the city has not demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Accordingly, the city may not withhold the remaining information at issue on that basis.

You assert some of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the decision in *Heidenheimer v. Tex. Dep't of Transp.*, No. 03-02-00127-CV, 2003 WL 124248 (Tex. App.– Austin Jan. 16, 2003, no pet.) (mem. op.). Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, upon review, we find the court’s decision in *Heidenheimer* does not make information confidential. Rather, the court addressed the applicability of section 552.105 of the Government Code to the facts and information at issue in the underlying open records decision. Thus, the city has not shown the applicability of section 552.101. In addition, the city has failed to make any arguments demonstrating the applicability of section 552.105 to the information currently at issue. Accordingly, the city may not withhold the information under section 552.105.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest any third party may have in it.

In summary, the city may withhold the information we have marked under Texas Rule of Evidence 503. The remaining information must be released.

³ As our ruling is dispositive, we do not address your other arguments to withhold this information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian E. Berger". The signature is fluid and cursive, with the first name "Brian" and last name "Berger" clearly distinguishable.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/ac

Ref: ID# 550246

Enc. Submitted documents

c: Requestor
(w/o enclosures)