



January 14, 2015

Ms. Danielle Folsom  
Assistant City Attorney  
Legal Department  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2015-00729

Dear Ms. Folsom:

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# 550132 (GC Nos. 21844 and 21853).

The City of Houston (the "city") received two requests for information pertaining to the fees, costs, and expenses related to a specified lawsuit, and fees paid by the city to specified law firms during a defined time period. You state the city will make some information available to the requestor. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.3. We have considered your arguments and reviewed the submitted information.

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

(a) [T]he 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; [and]

...

(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)(3), (16). In this instance, the submitted information consists of consulting contracts between the city and third parties and information in attorney fee bills. Thus, the city must release this information pursuant to sections 552.022(a)(3) and 552.022(a)(16), respectively, unless the information is confidential under the Act or other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the submitted information under section 552.103. The Texas Supreme Court has held, however, the Texas Rules of Evidence and the Texas Rules of Civil Procedure 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 address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and your assertion of the consulting expert privilege under rule 192.3 for the submitted information.

Texas Rule of Evidence 503(b)(1) 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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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).

You state the submitted information consists of privileged attorney-client communications between city attorneys and city employees. You state the communications at issue were made for the purpose of the rendition of legal services to the city. You also state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, 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 pursuant to rule 503 of the Texas Rules of Evidence.<sup>1</sup> However, we find the remaining information at issue documents communications with individuals you have not identified, and thus you have not demonstrated are privileged parties, or the information does not document communications. Therefore, you have not demonstrated how the remaining information at issue documents a privileged attorney-client communication for purposes of rule 503. Accordingly, no portion of the remaining information at issue may be withheld on that basis.

The consulting expert privilege is found in rule 192.3 of the Texas Rules of Civil Procedure. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* Tex. R. Civ. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” Tex. R. Civ. P. 192.7. You inform us the city contracted with consulting experts for services in anticipation of and

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

preparation for litigation pertaining to the lawsuit specified in the instant request for information. Furthermore, you state these experts have been retained solely for consultation and will not testify at trial. Based on your representations, we conclude the city may withhold the identities of the consulting experts, which we have marked, under Texas Rule of Civil Procedure 192.3(e). However, the remaining information does not reveal the identity, mental impressions, or opinions of the consulting experts. Accordingly, the city may not withhold the remaining information on the basis of Texas Rule of Civil Procedure 192.3(e).

In summary, the city may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. The city may withhold the information we have marked pursuant to Texas Rule of Civil Procedure 192.3(e). The city must release the remaining 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](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,



Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/bhf

Ref: ID# 550132

Enc. Submitted documents

c: Requestor  
(w/o enclosures)