



February 3, 2015

Mr. O. Charles Buenger
Counsel for the Chalk Bluff Water Supply Corporation
Buenger & Associates
3203 Robinson Drive
Waco, Texas 76706

OR2015-02111

Dear Mr. Buenger:

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# 552543.

The Chalk Bluff Water Supply Corporation (the "corporation"), which you represent, received a request for (1) any contract between the corporation and another party for legal services, (2) all bills or invoices for legal services rendered in connection with a specified cause number, and (3) all checks or payments rendered in connection with the specified cause number. You state the corporation will release information responsive to the third portion of the request to the requestor. You state the corporation does not maintain information responsive to the first portion of the request. You claim portions of the submitted information are privileged under rule 503 of the Texas Rules of Evidence and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002), 575 at 2 (1990).*

Initially, we address the requestor's contention that information responsive to the first portion of the request is maintained by the corporation. You claim the corporation does not maintain information responsive to this portion of the request. The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Whether the corporation actually maintains the information at issue is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Therefore, we must accept your assertion that the corporation does not maintain information responsive to the first portion of the request. We note a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the corporation has made a good faith effort to do so.

Next, you state, and we agree, the requestor seeks documentation created through the date of the request, as well as any new information that is created after the date of the request. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2, 452 at 2-3, 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present request consists of information the corporation maintained or had a right of access to as of the date it received the request.

Next, we must address the corporation's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). We note you did not raise rule 192.5 of the Texas Rules of Civil Procedure within that time. Thus, the corporation failed to comply with the requirements mandated by subsection 552.301(b) as to its claims under rule 192.5 of the Texas Rules of Civil Procedure. Generally, if a governmental body fails to timely raise an exception or a privilege, that exception or privilege is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). The attorney

work-product privilege under rule 192.5 of the Texas Rules of Civil Procedure is discretionary and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 677 at 10 (attorney work-product privilege under rule 192.5 is not compelling reason to withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general). Therefore, in failing to comply with section 552.301 of the Government Code, the corporation has waived its argument under rule 192.5 of the Texas Rules of Civil Procedure and may not withhold any of the submitted information on this basis. However, we will consider the corporation's timely-raised argument under rule 503 of the Texas Rules of Evidence.

We note the submitted information consists of attorney fee bills, which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[,] unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(16). You raise rule 503 of the Texas Rules of Evidence for the marked portions of the submitted attorney fee bills. 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 Texas Rule of Evidence 503 for the marked portions of the submitted attorney fee bills.

Rule 503(b)(1) provides the following:

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 do the following: (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. *See* ORD 676. 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, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the submitted attorney fee bills contain confidential communications between attorneys for the corporation and corporation staff or board members. You assert these communications were made for the purpose of facilitating the rendition of professional legal services to the corporation. Further, you state the information you have marked was intended to be, and has remained, confidential. Upon review, we find you have established some of the submitted information, which we have marked, constitutes privileged attorney-client communications the corporation may withhold under Texas Rule of Evidence 503. However, the remaining information at issue either is not a communication or is a communication with a party whom you have not established as privileged with respect to the communication. Thus, you have not established any of the remaining information you have marked consists of privileged attorney-client communications. Therefore, the corporation may not withhold any of the remaining information at issue on that basis. As you raise no further exceptions to disclosure, the corporation 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, 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 'Tim Neal', with a stylized, cursive script.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 552543

Enc. Submitted documents

c: Requestor
(w/o enclosures)