



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 6, 1994

Mr. E. T. Gibson  
City Manager  
City of Gonzales  
P.O. Drawer 547  
Gonzales, Texas 78629

Open Records Decision No. 630

Re: Whether the mere fact that information is within the attorney-client privilege and thus would be excepted from disclosure under section 552.107(1) of the Texas Open Records Act, Gov't Code ch. 552, constitutes a compelling reason for withholding the information where the governmental body has failed to request an open records decision within 10 days (RQ-557)

Dear Mr. Gibson:

On April 30, 1993, the City of Gonzales (the "city") received a written open records request for "all information pertaining to the creation of the Gonzales County Underground Water Conservation District . . . , as gathered by J. D. Head of [the law firm of] Ford & Ferraro."<sup>1</sup> In response to this request, the city sought a ruling from this office on May 11, 1993, as to whether the requested information may be withheld from

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<sup>1</sup>We note that the city had received an earlier open records request from another requestor for essentially the same information. The other request, which was dated March 29, 1993, sought "a copy of Ford and Ferraro's professional opinion as to what is the citizens of Gonzales best interest in regards to the proposed groundwater district in Gonzales County." At that time, the city did not seek a ruling from this office as to whether the requested information was subject to required public disclosure. Instead, acting on a determination by the city's outside counsel that the Open Records Act allowed the city to withhold the information, you simply informed the requestor that the city would not comply with his request. This requestor has since made an open records complaint to this office concerning the city's handling of his request. As part of his complaint, he submitted copies of his written open records request and subsequent correspondence to him from the city and its outside counsel.

We further note that, in a letter to the first requestor dated April 8, 1993, the city's outside counsel questioned the requestor's motives for seeking the information. Section 552.222 of the Open Records Act prohibits a governmental body from making any "inquiry of a person who applies for inspection or copying of a public record except to establish proper identification and the public records requested." Section 552.223 requires a governmental body to "treat all requests for information uniformly without regard to the position or occupation of the person making the request." Thus, the Open Records Act does not permit consideration of the motives of the requesting party. See Open Records Decision Nos. 542 (1990); 508 (1988); 161 (1977); 127 (1976) at 6.

disclosure under sections 552.101 and 552.107(1) (former sections 3(a)(1) and 3(a)(7)) of the Texas Open Records Act (the "act"), Gov't Code ch. 552.<sup>2</sup>

Section 552.301(a) provides that:

A governmental body that receives a written request for information that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time *but not later than the 10th calendar day after the date of receiving the request.* [Emphasis added.]

The city received the open records request on April 30, 1993, but did not request a ruling from this office until May 11, 1993. Consequently, the city failed to seek our decision within the 10-day period mandated by section 552.301(a).

When a governmental body fails to request an attorney general decision within 10 days of receiving an open records request, the information at issue is presumed public. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323-24 (Tex. App.--Houston [1st Dist.] 1984, no writ). In order to overcome this presumption, a governmental body must provide a compelling reason as to why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381; Open Records Decision Nos. 552 (1990); 319 (1982); 26 (1974). The city has not attempted to provide any specific compelling reasons to overcome the presumption that the requested information is public. The city does contend that this information is protected by the attorney-client privilege and is therefore excepted from disclosure by section 552.107(1).<sup>3</sup> This office has never specifically considered whether the fact that information is protected from disclosure by section 552.107(1) constitutes a compelling reason sufficient to

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<sup>2</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

<sup>3</sup>In your request for a ruling, you contend that the information is protected from disclosure by the attorney-client privilege in conjunction with section 552.101 (former section 3(a)(1)) of the act, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Although this office has in the past found former section 3(a)(1) to except from disclosure information within the attorney-client privilege, *see, e.g.*, Open Records Decision No. 304 (1982), this privilege is more appropriately invoked under section 552.107(1). *See* Open Records Decision No. 574 (1990) at 2.

overcome the presumption of openness where the governmental body has failed to make a timely request for an open records decision. Therefore, before we can address the applicability of this exception, we must determine whether you have waived any protection provided to the requested information by section 552.107(1) by failing to request our decision within 10 days.

In past decisions, this office has found compelling reasons sufficient to rebut the presumption of openness only in certain limited circumstances. As a general rule, this presumption may be overcome where the information at issue is deemed confidential by some source of law outside the act, and is therefore excepted from disclosure by section 552.101 (former section 3(a)(1)), or where the interest of a third party is at stake. For example, where information is confidential by statute or implicates the privacy interests of a third party, the information must be withheld from public disclosure even though the governmental body maintaining the information has failed to make a timely request for an open records decision. See Open Records Decision Nos. 71 (1975); 44, 26 (1974). This office has also found the fact that information constitutes a third party's trade secret that would be excepted from disclosure under section 552.110 (former section 3(a)(10)) a compelling reason to withhold the information from public disclosure. See Open Records Decision Nos. 552; 319. Similarly, the need of a governmental body, other than the one that has failed to seek our ruling within 10 days of receiving an open records request, to prevent disclosure of the information may provide a compelling reason sufficient to overcome the presumption of openness. See Open Records Decision No. 586 (1991).

Like section 552.101 and section 552.110, section 552.107(1) (former section 3(a)(7)) incorporates a body of law outside the act. This exception applies to

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

As construed by this office, this exception essentially incorporates the attorney-client privilege as set out in the Texas and federal rules of evidence and as interpreted by state and federal courts.<sup>4</sup>

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<sup>4</sup>Rule 1.05(b)(1) of the Texas State Disciplinary Bar Rules of Professional Conduct prohibits a lawyer from revealing confidential client information. Rule 1.05(a) defines "confidential information" to include both "privileged information" protected under rule 503 of the Texas civil and criminal rules of evidence and rule 501 of the Federal Rules of Evidence, and "unprivileged information," which includes all other client information held by a lawyer. In Open Records Decision No. 574 (1990), this office considered the interaction between the requirements imposed by the State Bar Rules on lawyers representing governmental bodies and former section 3(a)(7) of the Open Records Act. That decision held that former section 3(a)(7) only excepts from public disclosure "privileged information," *i.e.*, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5.

Ordinarily, a governmental body does not have the discretion to release confidential information. See Gov't Code § 552.007(a) (governmental body may voluntarily disclose information under act "unless the disclosure is expressly prohibited by law or the records are confidential" by law). Unlike most other situations where information is made confidential by some source of law outside the Open Records Act, the attorney-client privilege, as incorporated into section 552.107(1), belongs to and serves the interests of the governmental body as client. See generally TEX. R. CIV. EVID. 503(b) (*client has the privilege to refuse to disclose confidential communications*); TEX. R. CRIM. EVID. 503(b) (same); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 n.7 (Tex. 1990) (attorney-client privilege belongs to client); *Fuller v. State*, 835 S.W.2d 768, 769 (Tex. App.—Eastland 1992, pet. ref'd); *Bearden v. Boone*, 693 S.W.2d 25, 27 (Tex. App.—Amarillo 1985, no writ). In this respect, the attorney-client privilege is similar to the informer's privilege, which originates in law outside the act but protects a governmental body's interests and may therefore be waived by the governmental body. See Open Records Decision No. 549 (1990) (governmental body may waive protection of informer's privilege).

As a client, a governmental body may also waive the confidentiality provided by the attorney-client privilege "either expressly or implicitly by conduct." *United States v. Lipshy*, 492 F. Supp. 35, 43 (N.D. Tex. 1979). Both court decisions and the rules of evidence address the many ways in which a client or the client's representative or attorney may waive the attorney-client privilege. Clearly, a client waives the protection of the attorney-client privilege by voluntarily disclosing the privileged material to outside parties. The Texas rules of evidence specifically provide that a client waives the privilege if he "voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged." TEX. R. CIV. EVID. 511; TEX. R. CRIM. EVID. 511.<sup>5</sup> Court decisions have held that the privilege was waived by disclosure to outside parties in a variety of circumstances. See, e.g., *United States v. El Paso Co.*, 682 F.2d 530, 538-40 (5th Cir. 1982) (attorney-client privilege waived where information disclosed to independent accountants), *cert. denied*, 466 U.S. 944 (1984); *Axelson*, 798 S.W.2d at 554 (privileged information disclosed to federal officials and media); *Dobbins v. Gardner*, 377 S.W.2d 665, 668 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). The attorney-client privilege is also waived where privileged information is introduced into evidence at trial. See *Jackson v. State*, 624 S.W.2d 306, 309 (Tex. App.—Dallas 1981, no pet.).

Such an explicit and voluntary disclosure, however, is not necessary to effect a waiver of the attorney-client privilege. A client or the client's attorney may also implicitly waive the privilege by taking or failing to take certain actions. For example, Texas courts have held that the privilege is waived where the client files a lawsuit that calls into

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<sup>5</sup>Under rule 512, however, a waiver does not result from "a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege."

question the subject matter of privileged information. *See, e.g., Parten v. Brigham*, 785 S.W.2d 165, 167-68 (Tex. App.--Fort Worth 1989, no writ); *DeWitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692, 694 (Tex. App.--El Paso 1985, no writ).

In situations more analogous to a governmental body's failure to request an open records decision in a timely manner, the courts have found the attorney-client privilege waived where the client or the client's attorney or representative failed to take the necessary steps to claim the privilege. For example, in *Boring & Tunneling Co. v. Salazar*, 782 S.W.2d 284, 288 (Tex. App.--Houston [1st Dist.] 1989, no writ), the court held that the defendants in a civil lawsuit waived any claim that the privilege protected certain information from discovery because they did not specifically raise the privilege in their motion for protection of the information. The privilege was waived even though the defendants *had* asserted the privilege in objections to deposition questions and in a later mandamus proceeding. *See also Freeman v. Bianchi*, 820 S.W.2d 853, 858 (Tex. App.--Houston [1st Dist.] 1991, no writ) (attorney-client privilege waived where defendants failed to take procedural steps necessary to preserve claim to privilege). Likewise, the court in *Methodist Home v. Marshall*, 830 S.W.2d 220, 224 (Tex. App.--Dallas 1992, no writ), held that even though the defendant had asserted the attorney-client privilege as to certain documents sought in discovery, the defendant had nevertheless waived the privilege by failing to produce any evidence to support its claim.

Courts have repeatedly held that where a party in litigation fails to assert the attorney-client privilege at the proper time, the privilege is waived. For example, if a party produces documents containing privileged information during discovery without claiming the privilege, the privilege is waived as to those documents. *See, e.g., Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 772 (Tex. App.--El Paso 1985, no writ); *Eloise Bauer & Assocs. v. Electronic Realty Assocs.*, 621 S.W.2d 200, 204 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.). A waiver occurs in this situation even though the documents were produced inadvertently. *See Freeman*, 820 S.W.2d at 861; *Gulf Oil Corp.*, 695 S.W.2d at 773. In addition, a failure to assert the privilege at the time documents are produced in discovery cannot be corrected by later raising the privilege at trial, even if the judge then determines that the documents are indeed privileged. *See Bendele v. Tri-County Farmer's Co-op*, 635 S.W.2d 459, 464 (Tex. App.--San Antonio), *modified in part on other grounds*, 641 S.W.2d 208 (Tex. 1982); *Eloise Bauer & Assocs.*, 621 S.W.2d at 204. Similarly, a party waives any claim to the privilege by allowing privileged documents to be admitted into evidence at trial without objection; the privilege cannot later be raised on appeal. *See United States v. Moody*, 923 F.2d 341, 352-53 (5th Cir.), *cert. denied*, 112 S. Ct. 80 (1991); *Hudson v. Smith*, 391 S.W.2d 441, 449 (Tex. Civ. App.--Houston 1965, writ ref'd n.r.e.); *Hurley v. McMillan*, 268 S.W.2d 229, 233 (Tex. Civ. App.--Galveston 1954, writ ref'd n.r.e.).

As the discussion above illustrates, courts have held in many different situations that a client, or a person acting on the client's behalf, may waive the attorney-client privilege through both direct action and inaction. In the context of the act, past decisions

of this office have also recognized that the section 552.107(1) exception does not apply to information protected by the attorney-client privilege where the privilege has been waived by voluntary disclosure. *See* Open Records Decision Nos. 589 (1991) (information revealed to press); 412 (1984) (information publicly disclosed at board meeting of governmental body).

More significantly, this office has also held that this exception must be raised in a timely manner or else it will be waived. In Open Records Decision No. 515 (1988), a junior college district sought reconsideration of an informal open records ruling. Although the junior college district had not raised the former section 3(a)(7) exception in its original request for a ruling, it did attempt to raise this exception and one other, former section 3(a)(11) (now section 552.111), in its request for reconsideration as an additional reason for withholding the information at issue from public disclosure. This office held that because the junior college district had not raised these exceptions within the 10-day period following the receipt of the open records request, *i.e.* in its original request for a ruling, the junior college district was required to show compelling reasons why these additional exceptions should be considered. *Id.* at 6. Because the junior college district could not provide any such compelling reasons, this office declined to address the applicability of former sections 3(a)(7) and 3(a)(11) to the requested information. *Id.*

As in Open Records Decision No. 515, you have also failed to raise section 552.107(1) within the 10-day period required by section 552.301(a) of the act. The attorney-client privilege as incorporated into section 552.107(1) belongs to and benefits the client or governmental body rather than any third party, and clearly, the governmental body, or its agent, may waive the protection of this privilege in a wide variety of circumstances.<sup>6</sup> Accordingly, we conclude that the mere fact that information falls within

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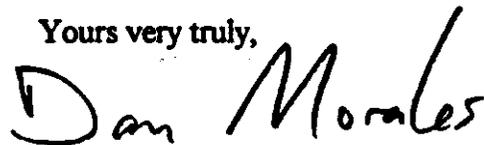
<sup>6</sup>We conclude as a matter of law that when a governmental body delegates the authority to seek an open records decision from this office to a particular individual official or employee of that governmental body or to outside counsel, that person is also authorized to either raise or waive any applicable exceptions under the Open Records Act, including section 552.107(1). Rule 503(a)(1) of the Texas rules of civil and criminal evidence defines the term "client" to include a "corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." TEX. R. CIV. EVID. 503(a)(1); TEX. R. CRIM. EVID. 503(a)(1). Rule 503(c) provides, in relevant part, that the attorney-client privilege may be claimed by the client or its representative, if the client is a "corporation, association, or other organization." TEX. R. CIV. EVID. 503(c); TEX. R. CRIM. EVID. 503(c). In addition, this rule provides that "[t]he person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client." Generally, a lawyer may not claim the attorney-client privilege on his own behalf; he may only do so on behalf of the client. *See Cole v. Gabriel*, 822 S.W.2d 296 (Tex. App.—Fort Worth 1991, no writ); *Fisher v. Continental Ill. Nat'l Bank & Trust*, 424 S.W.2d 664, 671 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). Where the lawyer acts within the authority granted to him by the client, however, he may both raise and waive the attorney-client privilege on behalf of the client. *See Fuller*, 835 S.W.2d at 769-71; *Bearden*, 693 S.W.2d at 27-28.

the section 552.107(1) exception does not alone constitute a compelling reason sufficient to overcome the presumption of openness that arises when a governmental body fails to request an attorney general decision within 10 days of receiving an open records request. Unless you can provide this office, within 10 days of receipt of this letter, some compelling reason as to why the requested information should be withheld, you must release this information in its entirety.

**S U M M A R Y**

When a governmental body fails to request an open records decision within 10 days of receiving a request for information under the Open Records Act, Gov't Code ch. 552, the requested information is presumed public. In order to overcome this presumption, a governmental body must provide a compelling reason as to why the information should not be disclosed. The mere fact that the information is within the attorney-client privilege and thus would be excepted from disclosure under section 552.107(1) of the Open Records Act if the governmental body had made a timely request for an open records decision does not alone constitute a compelling reason to withhold the information from public disclosure.

Yours very truly,



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