



July 31, 2001

Ms. Leah Simon Clark  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2001-3314

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150075.

The City of Waco (the "city") received a request for copies of "all outside counsel's billing records from January 4, 2001 to present, related to: the Bosque River TMDLs (Segment Nos. 1226 and 1255), and legislation relating in any way to concentrated animal feeding operations (CAFOs) or the Texas Natural Resource Conservation Reauthorization or Sunset Bill (H.B. 2912) or their companion bills, and *Texas Association of Dairymen v. Texas Resource Conservation Commission*, Cause No. GN100654; 353rd Judicial District Court, Travis County, Texas and any case consolidated with or related to it." You state that you have released some of the information to the requestor. However, you claim that the remainder of the responsive information consisting of attorney fee bills, marked as Exhibit 3, is excepted from disclosure under section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, and sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the

submitted representative sample of information.<sup>1</sup> We have also considered the requestor's comments. Gov't Code § 552.304.<sup>2</sup>

First, we note that the submitted documents include information that is subject to section 552.022. *See* Gov't Code § 552.022(a)(16) (information in attorney fee bills). Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. These documents must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Our office has previously concluded that sections 552.103 and 552.107 are discretionary exceptions. *See* Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 630 (1994) (section 552.107 is a discretionary exception). We do not believe that these exceptions "expressly [make] information confidential under other law." Gov't Code § 552.022.

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at 8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup> The city and requestor refer to prior open records requests and responses to those requests. We have reviewed the city's assertions on those matters and we are unable to decipher what has previously occurred. The requestor's comments have been forwarded to this office's Complaints Resolution Attorney. The city states that Open Records Letter No. 2001-1210 (2001) "serves as a previous determination as to the precise information at issue" in the instant request. City's May 23, 2001 Brief, p.1. However, the city contradicts itself by stating, "Although Attorney General Letter Ruling OR2001-1210 is not a previous determination as to the 'precise information at issue' in this request, the decision concerns attorney fee invoices and/or bills under Rule 503 of the Texas Rules of Evidence." *Id.* at 4. The instant request is for fee bills for a time period different from the request at issue in Open Records Letter No. 2001-1210. Thus, the prior decision is not a previous determination because it does not address the precise information at issue here. Open Records Decision No. 673 (2001). The prior decision is not dispositive of the applicability of Rule 503 to all fee bills. *Id.* The applicability of the attorney-client privilege must be determined on a case-by-case basis. This ruling will only discuss the May 9, 2001 request for the information discussed above.

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.

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. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged 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 document containing privileged information is 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Exhibit 3 contains five attorney fee bills highlighted to show which portions of the attorney fee bills the city wishes to withhold. After reviewing the submitted information, we agree that the attorney fee bills are privileged under Rule 503 of the Rules of Evidence because some of the entries are protected by the attorney-client privilege. Where a document contains confidential attorney-client communications, the privilege attaches to the entire document, not just to specific portions relating to legal advice, opinions or mental

analysis. *See Pittsburgh Corning*, 861 S.W.2d at 425.<sup>3</sup> However, if the city chooses to waive the privilege, it need not withhold the entire document. *See* Tex. R. Evid. 511(1) (holder of a privilege under the Rules of Evidence waives the privilege if the person “voluntarily discloses or consents to the disclosure of any significant part of the privileged matter”). Therefore, you may withhold the attorney fee bills, in their entirety, under section 552.101 in conjunction with Rule 503 of the Texas Rules of Evidence.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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<sup>3</sup> We have no information to establish the applicability of an exception to the attorney-client privilege in this case. *See* Tex. R. Evid. 503(d).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/DBF/seg

Ref: ID# 150075

Enc. Submitted documents

cc: Ms. Susan E. Potts  
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(w/o enclosures)