



August 28, 2001

Mr. Matthew C. G. Boyle  
Boyle & Lowry, L.L.P.  
4201 Wingren, Suite 108  
Irving, Texas 75062-2763

OR2001-3795

Dear Mr. Boyle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150743.

The City of Farmers Branch (the "city"), which you represent, received a request to view and copy all original invoices for charges billed to the city by the city's contracted attorneys between April 2000 and May 2001. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.<sup>1</sup>

We note at the outset that the submitted attorney fee bills are subject to section 552.022(a) of the Government Code. Section 552.022(a) provides in pertinent part:

(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 under this chapter unless they are expressly confidential under other law:

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<sup>1</sup> Although you claim that the submitted attorney fee bills are excepted from disclosure pursuant to section 552.101 of the Government Code, you offer no independent reasons why section 552.101 makes any of the information confidential by law. Accordingly, we do not address your section 552.101 claim regarding the submitted attorney fee bills.

....

(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)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. You claim that the information contained in the submitted attorney fee bills is excepted from disclosure pursuant to sections 552.103, 552.105, and 552.107 of the Government Code. However, sections 552.103, 552.105, and 552.107 are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022.<sup>2</sup> Accordingly, you may not withhold any information contained within the submitted attorney fee bills from disclosure pursuant to sections 552.103, 552.105, and 552.107(1) of the Government Code. 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 any of the information contained within the submitted attorney fee bills is confidential under Rule 503.

Rule 503(b)(1) of the Texas Rules of Evidence provides:

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;

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(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. *See* 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 information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the information 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); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure). Whether there has been a waiver of the attorney-client privilege through the release of otherwise privileged information depends not on whether the disclosure was intentional or inadvertent, but whether the disclosure was voluntary or was consented to or whether the disclosure was compelled erroneously or was made without opportunity to claim the privilege. *See Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 773 (Tex. App.—El Paso 1985, orig. proceeding).

After reviewing your arguments and the submitted attorney fee bills, we believe that you have demonstrated that some of the entries contained therein constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Although you acknowledge that the submitted information has been seen by the requestor, you argue that when the requestor was terminated from her employment with the city she:

improperly took with her certain information which was the property of the City. Included therein were this firm’s fee bills to the City for the same time period covered by her request. Pending the outcome of this request, the City has demanded the return of those bills from [the requestor] and her attorney, and we have been assured that the bills, along with other material she wrongfully took with her, will be returned to the City this week...they [were] never intended to be disclosed to a third party, a status which befell [the requestor] upon her termination.

Based on your representations to this office, we conclude that the previous release of the submitted information to the requestor was not "voluntary" and that it was made without the opportunity of the city to claim the attorney-client privilege. We, therefore, conclude that no waiver of the privilege occurred and that the city may withhold the information that we have marked in the submitted attorney fee bills from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. However, as to the remaining information in the submitted fee bills, we are unable to determine, and you do not explain, how any of it constitutes confidential communications between any of the categories of individuals listed in Rule 503(b)(1). Therefore, you may not withhold any of the unmarked information contained within the submitted attorney fee bills pursuant to Rule 503 of the Texas Rules of Evidence. Accordingly, you must release this information to the requestor.

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).

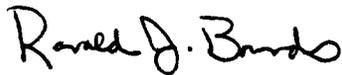
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 150743

Enc. Marked documents

cc: Ms. Sherry L. Fincher  
3933 Sunnyview Lane  
Flowermound, Texas 75022  
(w/o enclosures)