



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 30, 2003

Mr. G. Chadwick Weaver
First Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR2003-0646

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175849.

The City of Midland (the "city") received a request for "all documentation, invoices, and expenditures that show how much the [city] has spent on lawsuit #CV-43-83-7." You state that you have released the majority of the requested information, including the amount paid for legal services in the lawsuit in question. You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code and under the attorney-client privilege. We have considered the exceptions you claim and reviewed the submitted information.

We note initially, and you acknowledge, that the submitted documents contain information that is subject to section 552.022 of the Government Code, which makes certain information expressly public and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

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.

Gov't Code § 552.022 (emphasis added). One such category of expressly public information under section 552.022 is "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). The submitted attorney fee bills must be released under section 552.022 unless they are expressly confidential under other law. You argue that the submitted fee bills are excepted from

release under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a).¹ See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103); 522 at 4 (1989) (discretionary exceptions in general).

You also argue that the submitted information is excepted from release under the attorney-client privilege and Texas Rule of Evidence 503.

The Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and 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). Thus, we will determine whether the information at issue is confidential under rule 503.

Rule 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.

¹Discretionary 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. Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

Tex. R. Evid. 503. 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).

Thus, 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 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).

You claim that the attorney-client privilege applies to the submitted attorney fee bills. We find that in two cases, you have established that the information contained in the bills reveals a communication between a representative of an attorney for the city and the city itself, identified the parties to the communication, and shown that the communication was not intended to be disclosed to third parties and that it was made in furtherance of the rendition of professional legal services to the client. Therefore, we have marked this information on the attorney fee bills, which the city may withhold under rule 503. However, with regard to the remaining information, in some cases, you have failed to identify the parties to the communication, in other cases, the information you wish to withhold does not constitute a communication for purposes of rule 503, and in still another case, the communication you wish to withhold was clearly not made between privileged parties. *See* Open Records Decision No. 676 at 7-8 (2002) (privilege applies only to information that is communicated between privileged parties and government body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made). Accordingly, you may not withhold the remaining information under the attorney-client privilege. As you raise no further exceptions to release, you must release the remaining information.

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).

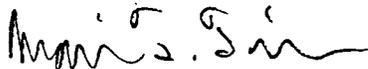
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 175849

Enc: Submitted documents

c: Ms. Kasey Kelly Vasicek
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(w/o enclosures)