



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 12, 2004

Mr. Terrence S. Welch  
Brown & Hofmeister, L.L.P.  
1717 Main Street, Suite 4300  
Dallas, Texas 75201

OR2004-2940

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199223.

The Town of Flower Mound (the "town"), which you represent, received a request for the following information:

1. All bills, billing statements, or invoices submitted to or paid by the [town] for any legal services rendered by the firm of Bickerstaff, Heath, Smiley, Pollan, Keever & McDaniel, L.L.P. or Terrence Welch on behalf of the [town] or any of its employees during the calendar years of 1999, 2000, and 2001.
2. All documents, memoranda, or tangible evidence relating to Robert Milton and any interest in any retirement plan, 401(k) plan, or saving plans whether a qualified plan, or unqualified plan, during the tenure of Mr. Milton's employment with the [town].

You state that the town does not object to the release of the information in item 2 of the request. Thus, we presume the town has released this information to the requestor. If not, the town must release the information in item 2 to the requestor immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that the attorney fee bill information requested in item 1 of the request is excepted from disclosure under 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 comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We note that the responsive attorney fee bills, submitted as Exhibit 2, are made public under 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:

....

(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). Thus, the information in the submitted attorney fee bills must be released unless it is expressly confidential under other law or protected by the attorney-client privilege. While you contend that this information is excepted from disclosure under section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception that protects the governmental body's interests and is not "other law" that makes information expressly confidential for purposes of section 552.022(a). *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the town may not withhold any portion of the submitted attorney fee bills pursuant to section 552.103 of the Government Code. We note that section 552.107 is also a discretionary exception under the Act. *See* Open Records Decision No. 676 (2002). However, as the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence, we will address your claim under the attorney-client privilege pursuant to Rule 503. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code).<sup>2</sup>

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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> We note the requestor contends the town has waived the privilege by disclosure of the attorney fee bills to this office in connection with the town's request for a ruling. The attorney fee bills at issue were submitted to this office pursuant to the procedural requirements of the Public Information Act (the "Act"). *See*

Rule 503(b)(1) of the Texas Rules of Evidence 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.

Tex. R. Evid. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer.") 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).

A governmental body seeking to withhold information from public disclosure pursuant to the attorney-client privilege must: (1) demonstrate that the document at issue is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) demonstrate 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. Open Records Decision No. 676 (2002).

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Gov't Code § 552.301(e)(1)(D) (governmental body seeking to withhold information pursuant to one of Act's exceptions must submit copy or representative sample of requested information to the attorney general no later than fifteen business days after receiving written request). The transfer of a representative sample of information at issue in an open records request to this office for review in the open records ruling process does not serve to waive any exceptions to the disclosure of the information. *See* Gov't Code § 552.3035 (attorney general may not disclose to requestor or public any information submitted to attorney general under section 552.301(e)(1)(D)). We find that the town has not waived its claim under the attorney-client privilege by submitting the information to this office as required under the Act.

You have highlighted the portions of the submitted attorney fee bills that the town seeks to withhold pursuant to the attorney-client privilege. Upon review of your arguments and the submitted information, however, we find you have not adequately identified the parties involved in the communications at issue, and you have not adequately demonstrated that the information you seek to withhold documents or reveals confidential communications between privileged parties. Moreover, we find you have not adequately demonstrated that the information was intended to be confidential, nor that the confidentiality of the information has been maintained. *See id.* We therefore determine the town has failed to establish that any portion of the information at issue is protected by the attorney-client privilege.<sup>3</sup> Consequently, we conclude the town must release the attorney fee bills at issue 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,

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<sup>3</sup> We also understand you to represent that portions of the information at issue may be protected under the attorney work product privilege. You have failed to provide any comments explaining why the work product privilege should apply to the requested information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body seeking to withhold information under the Act must submit written comments explaining why stated exceptions apply to the information). Consequently, we find the town has waived any claim under the attorney work product privilege for the information at issue.

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 Dep't of Pub. 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,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 199223

Enc: Submitted documents

c: Mr. David J. Moraine  
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(w/o enclosures)