



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2004

Mr. Jeffrey L. Moore  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2004-7907

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 208953.

The City of Murphy (the "city"), which you represent, received a request for a copy of the requestor's personnel file, attorney invoices showing correspondence between the requestor and a named individual, certain contracts, a copy of a city council meeting tape, a copy of a press release, copies of tapes, statements and affidavits of named individuals, and certain e-mail correspondence. You claim that you have released some of the requested information and that some of the requested information does not exist.<sup>1</sup> You assert that the submitted information is excepted from disclosure under section 552.108 of the Government Code and Texas Rule of Evidence 503. We have considered your claims and reviewed the submitted information.

Initially, we note that Exhibit D consists of attorney fee bills. Section 552.022 of the Government Code provides the following:

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

[T]he 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). You assert that the marked information in Exhibit D is privileged under Texas Rule of Evidence 503. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (Texas Rules of Evidence are "other law" for purposes of section 552.022); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will address your claim under the attorney-client privilege pursuant to Rule 503.

Texas Rule of Evidence 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.

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 it is 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). Thus, 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. Open Records Decision No. 676 (2002). On 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). Based on your arguments and our review of the information, we agree that the information you have marked in Exhibit D consists of privileged communications made between the city and its attorneys; therefore, this information is excepted from release pursuant to the attorney-client privilege.

You assert that the submitted audiotapes and affidavits in Exhibit C are excepted from release under section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” We note that the city council and the city attorney’s office are not law enforcement agencies. However, if an investigation by a non-law-enforcement agency reveals possible criminal conduct that the agency intends to report to the appropriate law enforcement agency, then section 552.108 will apply to the information gathered by the on-law-enforcement agency if the information relates to an open investigation or its release would interfere with law enforcement. See Attorney General Opinion MW-575 (1982), Open Records Decision No. 493 (1988); see also Open Records Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to the incident). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. See Gov’t Code §§ 552.108(a)(1), 552.301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform us that the submitted audiotapes and affidavits in Exhibit C were acquired during an investigation by the city council and the city attorney’s office of possible criminal violations committed by city employees and departments, and that this information will be presented to the Collin County Criminal District Attorney’s Office at the conclusion of the investigation. Based on these representations and our review of the submitted information, we conclude that the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref’d n.r.e., 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are

present in active cases). Thus, we find that the city may withhold the submitted audiotapes and affidavits in Exhibit C pursuant to section 552.108 of the Government Code.<sup>2</sup>

To conclude, you may withhold the privileged communications in Exhibit D that you have marked pursuant to Texas Rule of Evidence 503. The submitted audiotapes and affidavits in Exhibit C are excepted from release under section 552.108(a)(1) of the Government Code. The remaining information must be released.

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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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<sup>2</sup>Because we are able to resolve this under section 552.108, we do not address your other argument for exception regarding this information.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/seg

Ref: ID# 208953

Enc. Submitted documents

c: Ms. Michelle Jaynes  
1514 Schooner Bay Drive  
Wylie, Texas 75098  
(w/o enclosures)