



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2005

Ms. Deborah H. Loomis
Shaunessy & Burnett, P.C.
98 San Jacinto Boulevard, Suite 1400
Austin, Texas 78701

OR2005-04581

Dear Ms. Loomis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 224881.

The Hays County Commissioner's Court (the "county") received a request for information relating to two Papalote Homes lawsuits. The county has released most of the requested information but claim that the remainder is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that Document 4 is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides information in a contract relating to the receipts or expenditure of public funds by a governmental body is public information and not excepted from required disclosure under chapter 552 of the Government Code unless it is expressly confidential under other law. Document 4 must therefore be released under section 552.022(a)(3) unless it is expressly made confidential under other law. Section 552.107 of the Government Code, which excepts information within the attorney-client privilege, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. 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*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether Document 4 is confidential under Rule 503.

Rule 503(b)(1) 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;

(D) between representatives of the client or between the client and a representative of the client; or

(D) 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. See Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

The county states Document 4 is a communication between the county and its lawyer made in the furtherance of rendition of legal services. The county further explains the document was intended to be confidential and has remained confidential. Hence, we agree the county may withhold Document 4 pursuant to Rule 503.

Next, we consider the county's section 552.107 assertion for Documents 2 and 3. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). The elements of the privilege under section 552.107 are the same as those discussed for Rule 503. The county states the handwritten note in Document 2 is communication between the county lawyers made in the furtherance of rendition of legal services. Document 3 is a letter between the county and its prospective lawyer proposing the terms of engagement to provide legal representation. *See In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (communications made in course of preliminary discussions with view to employing attorney are protected by attorney-client privilege even though employment is not accepted). The county further explains both communications were intended to be confidential and have remained confidential. Hence, we agree the county may withhold the handwritten note in Document 2 and Document 3 pursuant to section 552.107.¹

Lastly, the county contends the notes in Document 1 are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

¹Because section 552.107 is dispositive, we do not address the county's other arguments.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. The county explains the notes were made by the county's special counsel while litigation was pending, they reveal her mental processes in evaluating the settlement offer, and they have not been shared with anyone. Based on these representations, we agree the county may withhold the notes under section 552.111.

In summary, the county may withhold the notes in Document 1 as attorney work product under section 552.111. The note in Document 2 and Document 3 are excepted under section 552.107. The county may withhold Document 4 under Texas Rule of Evidence 503.

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).

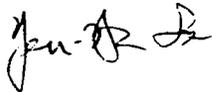
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 224881

Enc. Submitted documents

c: Mr. Charles O'Dell
Executive Director
Hays Community Action Network
14034 Robins Run
Austin, Texas 78737-9227
(w/o enclosures)