



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2006

Mr. John P. Danner
Assistant City Attorney
City of San Antonio
P. O. Box 839966
San Antonio, Texas 78283

OR2006-06178

Dear Mr. Danner:

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# 251288.

The City of San Antonio (the "city") received a request for the following information: 1) all documents, including transcripts of meetings, related to city ordinance number 98055; 2) all invoices or pay applications submitted by Kell Munoz Architects, Inc. ("Kell Munoz") regarding a specified project; 3) a copy of the contract between the city and Kell Munoz; and 4) all correspondence or documents exchanged between the city and Kell Munoz pertaining to the specified project. You state that the city sought clarification from the requestor for the fourth item requested. You state that the requestor did not narrow his request, but instead broadened it to include an additional third party, 3DI. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, we note that a portion of the information you have submitted for our review is not responsive to the present request. This ruling does not address the public availability of information that is not responsive to the request, and the city need not release such information in response to the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).²

We note that the submitted information includes two city ordinances. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”)*. Accordingly, the submitted city ordinances must be released.³

We also note that the submitted information includes minutes of two city council meetings. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the “minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body’s chief administrative officer or the officer’s designee.” Gov’t Code § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g., Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976)*. The city must release the minutes of its open meeting in accordance with section 551.022.

The submitted information also includes a contract and a contractor’s application for payment, both relating to the expenditure of public or other funds by the city. This information is subject to section 552.022 of the Government Code, which provides in relevant 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:

...

²You have claimed that a portion of this information is excepted from disclosure under section 552.111 of the Government Code. However, as this information is non-responsive, we need not address your arguments under this exception.

³We note that each ordinance has documents attached to it that are not part of the ordinance itself. Since it does not appear that these attachments are part of the ordinance, we will consider whether these attachments may be withheld under the exceptions you have claimed.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). Although you claim that this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions that a governmental body may waive. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103 of the Government Code); 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) of the Government Code may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not “other law” that make information expressly confidential for purposes of section 552.022. Therefore, the city may not withhold the contract or the contractor’s application for payment under section 552.103 or section 552.107. However, section 552.101 is “other law” within the meaning of section 552.022. Further, the attorney-client privilege is also found within Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that the Texas Rules of Evidence is “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claims under section 552.101 and Rule 503 of the Texas Rules of Evidence.

You claim that the contract and the contractor’s application for payment are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You assert that the submitted information is subject to the discovery scheduling order issued by the judge in the case styled Cause No. 2004-CI-16706, *Martin Wright Elec. V. Sandoval Plumbing Repair, Inc., et.al.*, (150th Dist. Ct., Bexar County, Tex.). You state that because the deadline for discovery has passed pursuant to the scheduling order, the information should be withheld from disclosure. We note, however, that discovery procedures and requests made under the Act are two disparate processes. *See Attorney General Opinion JM-1048* at 3 (1989) (stating that the fundamental purposes of the Act and of civil discovery provisions differ); *Open Records Decision No. 551* (1990) at 3-4 (discussion of relation of Act to discovery process). The discovery process is a process through which parties to litigation can obtain information pertaining to the litigation. A public information request under the Act is a process in which any individual may request information from a governmental body. Thus, the discovery process has no bearing on the availability of information requested under Act. Furthermore, we note that

the language of the discovery scheduling order does not make any information confidential, nor does it preclude the city from complying with the Act in regards to a request for information. Therefore, the contract and the contractor's application for payment are not confidential under section 552.101.

Next, we address whether the contract and the contractor's application for payment may be withheld under Rule 503(b)(1), which 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). 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).

The city and Kell Munoz are the two parties involved in the contract and the contractor's application for payment. You have not provided any arguments establishing that Kell Munoz is either a client, a representative of a client, or a representative of a lawyer. Thus, you have failed to demonstrate that the documents at issue were transmitted between parties with a privileged attorney-client relationship. Therefore, you may not withhold the contract or the contractor's application for payment under Rule 503 and these documents must be released.

We now turn to your arguments for the remaining submitted information. Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the city is currently a party to Cause No. 2004-CI-16706 in the District Court, 150th Judicial District, Bexar County, Texas in which both the requestor, who represents Sandoval Plumbing Repair, Inc. ("Sandoval"), and the city are named as defendants. You further state that Sandoval has filed a cross-claim against the city in regards to the construction contract dispute. Based on the information you have provided, we conclude that you have shown that litigation was pending when the city received this request.

Further, you have provided arguments and documentation showing that the remaining information is related to the pending litigation. Thus, based on your representations and our review, we agree that the remaining information is related to the pending litigation for purposes of section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all of the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release the following: 1) the city ordinances; 2) the minutes of the city council meetings pursuant to the Open Meetings Act; and 3) the contract and the contractor's application for payment pursuant to section 552.022 of the Government Code. The remaining responsive information may be withheld pursuant to section 552.103 of the Government Code.

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); *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 Office of the Attorney General 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,



Candice M. De La Garza
Assistant Attorney General
Open Records Division

CMD/krl

Ref: ID# 251288

Enc. Submitted documents

c: Mr. John Dulske
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(w/o enclosures)