ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2008

Mr. Jefferson Davis
County Attorney
Nacogdoches County
101 West Main Street, Room 218
Nacogdoches, Texas 75961

OR2008-08416

Dear Mr. Davis:

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# 313138.

Nacogoches County (the "county") received a request for six categories of information pertaining to a county project involving a specified marina. You state that you have released a portion of the requested information. You claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note and you acknowledge, that Exhibit C consists of attorney fee bills. Attorney fee bills are subject to section 552.022 of the Government Code, which provides for the required public disclosure of "information that is in a bill for attorneys fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). Although you seek to withhold information contained in the attorney fee bills under section 552.107 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022(a)(16). Therefore, the county may not withhold any of the information in the fee bills in Exhibit C under section 552.107.

The Texas Supreme Court has held, however, that the 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). The attorney-client privilege also is found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the attorney fee bills contained in Exhibit C.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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.

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).

You state that the highlighted portions of the attorney fee bills document confidential communications between attorney's for the county and their clients that were made for the purpose of facilitating the rendition of professional legal services to the county, and that the communications were intended to remain confidential. You have identified some of the parties to the communications. Based on your representations and our review of the information at issue, we agree that a portion of highlighted information reveals confidential communications between privileged parties. Accordingly, you may withhold a portion of the fee bills that you have highlighted pursuant Texas Rule of Evidence 503. However, the remaining information that you have highlighted either does not document communications or documents communications with individuals that you have failed to identify as privileged parties. Because you failed to demonstrate the applicability of the attorney-client privilege to this remaining information, it may not be withheld under Texas Rule of Evidence 503. As you raise no other exception to disclosure of this information, it must be released to the requestor.

Next we address your arguments under section 552.107 of the Government Code for the information that is not subject to section 552.022. When asserting the attorney-client privilege under section 552.107, 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. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for Rule 503 outlined above.

You explain that the highlighted portions of Exhibit D and all of Exhibit E consist of confidential communications among county attorneys, employees, and officials, and that they were made in furtherance of the rendition of professional legal services. The county indicates the communications were intended to be and remain confidential. After reviewing your arguments and the submitted information, we agree that the highlighted portions of Exhibit D and all of Exhibit E constitute privileged attorney-client communications that the county may withhold under section 552.107.

Finally, we note that the remaining information in Exhibit D also contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(b). You do not inform us that the owner of the e-mail address has affirmatively consented to release. Therefore, unless the county receives consent to release it, the county must withhold the e-mail address we have marked under section 552.137.

In summary, with the exception of the information we have marked for release, the county may withhold the highlighted portions of Exhibit C under Texas Rule of Evidence 503. The county may withhold the highlighted portions of Exhibit D and all of Exhibit E under section 552.107. Unless the county receives consent to release you must withhold the e-mail address we have marked in Exhibit D under section 552.137. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

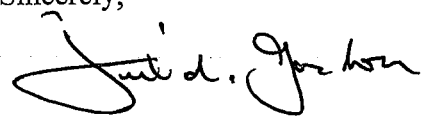
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Justin D. Gordon
Assistant Attorney General
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JDG/eeg

Ref: ID# 313138

Enc. Submitted documents

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(w/o enclosures)