ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2008

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2008-12882

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), Government Code chapter 552. Your request was assigned ID# 322079.[1]

The Department of Public Safety (DPS) received a request for copies of invoices from an attorney serving as outside counsel to DPS in a lawsuit against the attorney general's office. DPS is making available to the requestor copies of responsive invoices, but you have redacted from those copies information that you believe is excepted from required disclosure pursuant to sections 552.101 and 552.107 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5.

We first note that the information at issue is contained in attorney fee bills and thus is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's 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). Section 552.107 of the Government Code, which you claim, is a discretionary exception to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; Open Records

[1]You received the request for records on June 30, 2008 and you delivered your letter to this office on July 15, 2008. Because state offices were closed on the Independence Day holiday on July 4, 2008, your request is timely made pursuant to Government Code section 552.301. *See id.* § 552.301(b) (governmental body must ask for decision from this office and state exceptions that apply within ten business days of receiving written request).

Decision Nos. 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, DPS may not withhold any of the information at issue under section 552.107 of the Government Code. Although you also claim section 552.101 of the Government Code, which is a confidentiality provision for the purposes of section 552.022(a)(16), that exception does not encompass discovery privileges. *See* ORD 676 at 1-3. Therefore, DPS may not withhold any of the information at issue on the basis of the attorney-client privilege or attorney work product privilege under section 552.101 of the Government Code.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider DPS's assertion of these privileges for the marked information in the attorney fee bills.

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:
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> > (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
> >
> > (F) 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).

With respect to the marked information in the invoices that you believe may be withheld pursuant to Rule 503, you indicate that the invoices were prepared by outside counsel or his staff, sent to the General Counsel's office at DPS, and reflect communications with the General Counsel's office regarding legal services provided. The DPS General Counsel's office has disclosed the contents of the invoices only to privileged parties. Thus, you provide information to demonstrate the necessary elements of the attorney-client privilege under Rule 503, and DPS may withhold the marked information from disclosure under Rule 503. Because Rule 503 is dispositive, we do not address DPS's other arguments.

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,

Susan Garrison
Assistant Attorney General
Opinion Committee

SG/sdk

Ref: ID# 26982

Enc: Submitted document

c: Mr. Dave Mann
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(w/o enclosure)