



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2008

Ms. Yolanda P. Esparza
Hudspeth County Auditor
P.O. Box 279
Sierra Blanca, Texas 79851

OR2008-13802

Dear Ms. Esparza:

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# 234162.

Hudspeth County (the "county") received a request for information pertaining to the legal services rendered to the county, over a particular period of time, by Flowers & Davis, P.L.L.C. in connection with two specified causes of action. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note that Exhibit D is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See* Gov't Code § 552.022(a)(16). You claim that Exhibit D is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. Sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body), 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, these sections

do not make information confidential. Therefore, the county may not withhold Exhibit D under section 552.103 or section 552.107. You also contend, however, that Exhibit D is protected under the attorney-client privilege found in rule 503 of the Texas Rules of Evidence. Because the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022, we will consider whether any of Exhibit D may be withheld under rule 503 of the Texas Rules of Evidence. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

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. 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 submitted attorney fee bills, submitted as Exhibit D, contain confidential communications between the county's outside counsel and the county attorney, elected officials, and employees that were made for the purpose of facilitating the rendition of professional legal services to the county. Based on your representations and our review of the information at issue, we agree that a portion of Exhibit D contains information that reveals confidential communications between privileged parties. Accordingly, the county may withhold the information we have marked in Exhibit D pursuant to Texas Rule of Evidence 503. Some of the remaining information in Exhibit D, however, does not consist of or reveal confidential attorney-client communications. Further, some of the remaining information contains communications to individuals whom you have not identified as clients, client representatives, attorneys, or attorney representatives. Thus, the county has failed to demonstrate how any of the remaining information in Exhibit D constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, none of the remaining information in Exhibit D may be withheld on that basis.

We will now address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in relevant part as follows:

(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 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). The 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 is pending or reasonably anticipated, 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). The

governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and the submitted documents reflect, that prior to the county's receipt of the present request for information, two lawsuits, both styled *Pascual Q. Olibas v. Arvin West, Sheriff of Hudspeth County, Texas*, were filed against the county in the 205th Judicial District of Hudspeth County, Texas. You assert that the information at issue relates to the pending lawsuits involving the sheriff of Hudspeth county in his individual and official capacity. Based on your representations and our review, we conclude that the county was a party to pending lawsuits when it received the request for information. We also conclude that the information not subject to section 552.022 is related to the pending litigation. Accordingly, we find that section 552.103 is generally applicable to the information not subject to section 552.022.

We note, however, that the opposing party in the pending lawsuits appears to have already seen or had access to some of the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information that has either been obtained from or provided to the opposing party in the pending lawsuits is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). The county may not withhold any of the information not subject to section 552.022 that the opposing party has seen or had access to under section 552.103 of the Government Code. Accordingly, to the extent the opposing party has not seen or had access to information not subject to section 552.022, the county may withhold it under section 552.103.

In summary, the county may withhold the information we have marked in Exhibit D pursuant to Texas Rule of Evidence 503. To the extent the opposing party has not seen or had access to the information not subject to section 552.022, the county may withhold it under section 552.103. 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).

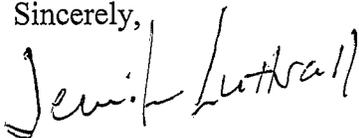
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 324162

Enc. Submitted documents

c: Mr. Pascual Q. Olibas
Freedom Bail Bonds
P.O. Box 1615
Canutillo, Texas 79835
(w/o enclosures)