



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2009

Mr. Randall P. Gunter
Fielder & Gunter
310 Main
Liberty, Texas 77575

OR2009-00462

Dear Mr. Gunter:

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# 331883.

The City of Liberty (the "city"), which you represent, received a request for all information relating to the city retaining the services of private investigators during a particular time period, including all documents given to the city by private investigators during a particular time period, and all documents concerning the nature of the matters for which a private investigator was hired by the city to investigate. You state that you are providing the requestor with some of the requested information. You assert the remaining requested information is not subject to the Act. In the alternative, you claim that this information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the arguments you make and reviewed the submitted information.

Initially, we address your assertion that the submitted information is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *See* Gov't Code § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party

may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information and it relates to the transaction of official business. *See* Open Records Decision Nos. 462 (1987), 445 (1986); *cf.* Open Records Decision No. 499 (1988).

You inform this office that the city contracted with an attorney who hired a private investigator to look into employment allegations. You state that the submitted investigative materials were compiled by the private investigator for the city attorney. You argue these materials are not maintained in city files and that no city employee has ever seen them. You also inform this office, however, that the information was used by the city's attorney to provide advice to the city regarding the employment allegations. Thus, this information relates to the transaction of official city business, and we conclude that the city would have a right of access to this information being held by its attorney. Accordingly, we find the submitted information is subject to the Act, and we will consider your arguments against disclosure of this information.

You acknowledge that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code states 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1) of the Government Code, a completed investigation is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you claim this information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, we note that these sections are discretionary exceptions under the Act that do not constitute "other law" for purposes of section 552.022. *See 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); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the city may not withhold the submitted information under section 552.103, 552.107 or 552.111 of the Government Code. However, section 552.101 of the Government Code is other law for purposes of section 552.022. Therefore, we will consider your arguments under this exception as well as section 552.108 of the Government Code. Furthermore, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. *See In re City of*

Georgetown, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision No. 676 (2002). Accordingly, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 with respect to the submitted information.

Texas Rule of Evidence 503 encompasses the attorney-client privilege and provides in part:

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).

Based on your representations and our review, we find you have established that the submitted information is protected under the attorney-client privilege and may be withheld

pursuant to rule 503 of the Texas Rules of Evidence. *See also Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/eeg

Ref: ID# 331883

Enc. Submitted documents

c: Requestor
(w/o enclosures)