



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 20, 2009

Ms. Cheryl K. Byles  
City of Fort Worth  
1000 Throckmorton Street, 3<sup>rd</sup> Floor  
Fort Worth, Texas 76102

OR2009-14857

Dear Ms. Byles:

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# 358674 (Fort Worth Request No. 4379-09).

The City of Fort Worth (the "city") received a request for nine categories of information related to a specified oil and gas lease project at the Dallas Fort Worth International Airport ("DFW"), including any information regarding: (1) DFW requests for qualifications for the lease project from 2005 to the present; (2) bids submitted by the Chesapeake Energy Corporation or its related companies (the "Chesapeake Companies") for the lease project from 2005 to present; (3) DFW lease contracts with the Chesapeake Companies from 2005 to present; (4) complaints from subcontractors concerning the Chesapeake Companies and the DFW lease contracts from 2005 to present; (5) documents referring to the Chesapeake Companies from 2005 to present; (6) documents reflecting the Minority/Women Business Enterprise status of subcontractors working with the Chesapeake Companies on the DFW lease contract from June 2005 to present; (7) DFW board meeting minutes related to the DFW lease contract, SEBD, or the Barnett Shale from June 2005 to present; (8) how bids for the DFW lease contract were evaluated and selected; and (9) the natural gas marketing of the city's royalties under the DFW lease contract from June 2005 to present. You state that the requestor has withdrawn his request for the information in category five, and that the city

does not maintain or have access to the information requested in category four.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code. You also notified DFW and the City of Dallas ("Dallas") of the request and their right to submit comments to this office. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, although you generally assert the work product privilege applies to some of the submitted information, you have provided no comments explaining why this privilege should be applicable. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). You also marked some information under section 552.104 without providing arguments explaining how that exception is applicable to the information. Thus, because you have not provided arguments explaining the applicability of the work product privilege or section 552.104 to the information you submitted, we assume the city no longer intends to withhold any information on these bases. Additionally, although you marked some information under section 552.110, that exception is designed to protect the interests of third parties, not the interests of governmental bodies. *See* Gov't Code § 552.110. Accordingly, even if the city, DFW, or Dallas had presented arguments under section 552.110, the exception would not be applicable in this instance.

You assert many of the submitted documents are not responsive to the request. Upon review, we marked the submitted information that is not responsive, either because it was created after the date the city received the request, or because it does not relate to any of the seven remaining categories of requested information. This ruling does not address the public availability of the information we marked, and the city is not required to release this information in response to this request.

The responsive information includes resolutions, passed by DFW's board of directors, that are specifically responsive to the first, second, and eighth categories of requested information. 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 No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolutions are analogous to an ordinance. Accordingly, the city must release the submitted resolutions in their entirety.

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

The responsive information also includes the final agendas and minutes from public meetings of DFW's board of directors. The agendas and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). Although you assert these documents are excepted under sections 552.103, 552.107, and 552.111 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting agendas and minutes we marked must be released.

Some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(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, or by a governmental body[;]

...

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

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The responsive information includes two reports prepared by an outside consultant in preparation for a lawsuit against DFW, the city, and Dallas. Because these reports were completed for the city, we conclude they are expressly public under section 552.022(a)(1). The responsive information also includes an executed agreement to which the city is a party. This agreement provides that the city will receive specified funds from DFW as capital contribution reimbursement. Upon review, we determine this agreement relates to the city's receipt of public funds, and is therefore subject to section 552.022(a)(3). You also submitted some court-filed documents that are subject to section 552.022(a)(17).

Generally, the city may only withhold information subject to section 552.022 if it is expressly confidential under "other law." *Id.* § 552.022(a). You claim all these documents are excepted under sections 552.103 and 552.107, and that some are excepted under the deliberative process prong of section 552.111. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (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), 665 at n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As such, these sections are not "other law" that make information confidential for purposes of section 552.022. Therefore, the city may not withhold the documents that are subject to section 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. However, the attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336-37 (Tex. 2001). Accordingly, we will consider the applicability of rule 503 to all documents subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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:

(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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 executed agreement and some of the court-filed documents are attachments to communications between and among individuals you identify as officials, board members, employees, and attorneys of the city, DFW, and Dallas. You explain DFW and Dallas share a privity of interest with the city concerning the legal matters at issue in these communications. You state these communications were made for the purpose of facilitating legal services to the city. Finally, you represent the parties to these communications intended the information to be kept confidential and that confidentiality has been maintained. However, the executed agreement and these court-filed documents exist separate and apart from any privileged communication. Additionally, the reports subject to section 552.022(a)(1), as well as the remaining court-filed documents, are not part of a communication. Therefore, because these documents are not privileged communications, they may not be withheld under rule 503. As you raise no other exceptions to disclosure of the submitted reports, agreement, and court-filed documents, they must be released.

We next turn to your claim under section 552.103 of the Government Code for the remaining responsive information. 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 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to receiving this request the city was sued by a party with a working interest in the specified oil and gas lease. The documents show this lawsuit arose over a dispute regarding the royalty payments owed under the lease. Accordingly, we agree litigation was pending as of the date the request was received. Upon review, we also find the responsive documents relate to this pending litigation against the city. Thus, we conclude the remaining responsive information is generally subject to section 552.103. However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. See ORD 551 at 4-5. Thus, once information is obtained from or provided to all the opposing parties in the litigation, there is no interest in withholding that information under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Some of the remaining responsive documents reflect they were obtained from or provided to the city's opposing party in the pending litigation. These documents may not be withheld under section 552.103, and we will address your remaining raised exceptions to disclosure where they are asserted for these documents. The documents which do not reflect they were provided to the city's opposing party, however, may be withheld under section 552.103 of the Government Code.<sup>2</sup> We note that the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim the remaining responsive documents are excepted under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "for the

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

purpose of facilitating the rendition of professional legal services” to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a *confidential* communication, meaning it was “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.” ORD 676.

The remaining documents consist of one e-mail and eleven letters. All eleven of the letters reflect they were mailed to the city’s opposing party in the litigation, who is not a privileged party. Because these documents were communicated with a non-privileged party, they are not privileged. Although five of these letters are attachments to otherwise privileged attorney-client communications, we find these letters exist separate and apart from the protected communications to which they are attached. We therefore conclude the city may not withhold the eleven non-privileged letters under section 552.107. As you raise no more exceptions to disclosure for ten of the remaining letters, these documents must be released. The remaining e-mail was also sent to the city’s opposing party, and thus is not privileged. However, this e-mail is contained in an e-mail string that is otherwise privileged. To the extent the marked non-privileged e-mail exists separate and apart from the e-mail string, it may not be withheld under section 552.107, and we will consider it with the remaining letter. If the marked e-mail does not exist separate and apart from the string in which it was submitted, this e-mail may be withheld along with the e-mail string as a privileged attorney-client communication.

Section 552.111 encompasses the deliberative process privilege, which you assert applies to the remaining letter and e-mail. The purpose of the deliberative process privilege under section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5 (1993). Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the

governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

The remaining letter and e-mail were sent to the city by a third party. These documents do not contain the advice, opinion, or recommendation of the city, and you have not explained how this third party has a privity of interest or common deliberative process with the city. We therefore conclude the deliberative process prong of section 552.111 is inapplicable to this information. Accordingly, the remaining information must be released.

In summary, the information we marked must be released. The city must also release the e-mail we marked as non-privileged if it exists separate and apart from the related e-mail string. The remaining responsive information may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 358674

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)