



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2010

Mr. Riley Woods
Senior Staff Counsel
Brazos River Authority
P.O. Box 7555
Waco, Texas 76714-7555

OR2010-02650

Dear Mr. Woods:

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# 371156.

The Brazos River Authority (the "authority") received a request for any cost-benefit analysis relating to the decision to close down an authority hydroelectric generation facility.¹ You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note that portions of the submitted information are made expressly public under 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 You state, and provide documentation showing, the authority sought and received clarification from the requestor. *See* Gov't Code §§ 52.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period governmental body is waiting for clarification).

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

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (5). The preliminary report in Exhibit 5 is subject to section 552.022(a)(1) and (5). The notes in Exhibit 4, the draft report in Exhibit 5, and the cost-benefit review in Exhibit 6 are subject to section 552.022(a)(5). The authority may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* You do not raise or explain the applicability of section 552.108 to any of the information at issue. Thus, you may not withhold the information based on section 552.108. The authority may only withhold the information subject to section 552.022(a)(5) if it is confidential under other law. You assert that the information subject to section 552.022 is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. 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.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the authority may not withhold the information subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022. We will also address your claims under sections 552.103 and 552.107 for the information in Exhibit 4 that is not 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).

You inform us the information in Exhibit 4 was communicated by the authority's legal counsel to the authority's Board of Directors (the "board") during the executive session of a board meeting for the purpose of providing legal services. You state the information in Exhibit 5 was prepared by a consulting expert hired by the authority's legal counsel for the purpose of providing expert services needed in the course of rendering legal services to the authority. You inform us the information in Exhibit 6 consists of a communication between authority staff and legal counsel for the purpose of rendering legal services regarding pending litigation. You also state the information in Exhibits 4, 5, and 6 has not been disclosed to any third parties. You further inform us this information is intended to remain confidential. Based on your representations and our review of the information at issue, we find the authority has established the information at issue is protected by the attorney-client privilege. Thus, the authority may withhold this information pursuant to rule 503 of the Texas Rules of Evidence.

Turning to your exceptions to disclosure of the remaining information, we address your claim under section 552.107 of the Government Code for the remaining information in Exhibit 4 that is not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Rule 503. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You contend that the remaining information in Exhibit 4 consists of privileged communications between the authority's counsel and the board. You state that the communications were made in furtherance of the rendition of professional legal services to the authority. You also state that the communications were not intended to be disclosed to third parties. Based on your representations and our review of the information at issue, we conclude that the authority may withhold the remaining information in Exhibit 4 under section 552.107(1). As our ruling is dispositive, we need not address your remaining arguments against disclosure.

In summary, the authority may withhold the notes in Exhibit 4, the draft report and preliminary report in Exhibit 5, and the cost-benefit review in Exhibit 6 pursuant to rule 503 of the Texas Rules of Evidence. The authority may withhold the remaining information in Exhibit 4 under section 552.107 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, 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/rl

Ref: ID# 371156

Enc. Submitted documents

c: Requestor
(w/o enclosures)