



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2011

Mr. Gene McCullough
McCullough and McCullough
P.O. Box 2244
Harlingen, Texas 78551-2244

OR2011-03776

Dear Mr. McCullough:

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# 411706.

The Valley International Airport (the "airport"), which you represent, received a request for (1) all billing records from a specified law firm for services rendered to the airport since January of 2007; (2) all billing records from another specified law firm for services rendered to the airport since the law firm was first retained; (3) all communications between the airport's staff, the airport's board members, the City of Harlingen, a named individual, or anyone else regarding Gulf Aviation and Sun Valley Aviation since September of 2010; and (4) audio recordings of Harlingen City Commission open session meetings on November 29, 2010 and December 1, 2010. You state the airport has released some information responsive to items one and three. You claim the submitted information is excepted from disclosure under Texas Rule of Evidence 503. We have considered your argument and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to item four of the request. We assume, to the extent any information responsive to item four existed when the airport received the request for information, you have released this information to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 52.006, .301, .302; Open Records Decision No. 664 (2000).

You acknowledge the submitted information in exhibits C and D consists of attorney's fee bills 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). The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your arguments under rule 503 of the Texas Rules of Evidence for exhibits C and D.

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 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 claim the submitted fee bills in exhibits C and D are confidential in their entirety. However, section 552.022(a)(16) of the Government Code provides that information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under “other law” or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See* Open Records Decision Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice).

You state the attorney fee bills in exhibits C and D contain confidential communications between the employees of the airport and the airport’s attorneys. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the airport. Further, you indicate the fee bills were intended to be, and have remained, confidential. Accordingly, the airport may withhold the information we have marked in exhibits C and D on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We note, however, that you have failed to identify some of the parties to the communications in the attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503). As a result, we find you have failed to demonstrate that any of the remaining information subject to section 552.022 documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the remaining information, and it may not be withheld on this basis.

You also raise the attorney-client privilege for the submitted information in exhibit F.¹ Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made

¹Although you raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-3 (2002).

“for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), 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.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. 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 state the e-mails in exhibit F contain confidential communications between employees of the airport and the airport’s attorneys. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the airport. Further, you indicate these e-mails were intended to be, and have remained, confidential. Based on your representations and our review, we agree the airport may withhold most of the e-mails in exhibit F on the basis of the attorney-client privilege under section 552.107 of the Government Code. We note, however, several of the individual e-mails contained in the otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107.

In summary, the airport may withhold the information we have marked in exhibits C and D on the basis of the attorney-client privilege under Texas Rule of Evidence 503. The airport may withhold exhibit F under section 552.107 of the Government Code; however, to the

extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, the non-privileged e-mails may not be withheld under section 552.107. The remaining information must be released to the requestor.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eeg

Ref: ID# 411706

Enc. Submitted documents

c: Requestor
(w/o enclosures)