



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2011

Mr. Terry Jacobson
Jacobson Law Firm, P.C.
For City of Corsicana
733 West Second Avenue
Corsicana, Texas 75110

OR2011-11141

Dear Mr. Jacobson:

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# 425671.

The City of Corsicana (the "city"), which you represent, received two requests from the same requestor for the following: (1) the type and maker of the current water meters; (2) the type, maker, invoices, and year of purchase of the water meters installed or recommended by Johnson Controls ("Johnson"), as referenced in a specified news article; (3) the authority by which the city Council purchased replacement water meters; (4) the number of replacement water meters; (5) the communications pertaining to water meters between the manufacturer of the meters recommended by Johnson, Johnson, consultants hired by the city, and any other cities or engineering firms; (6) the status of any pending or anticipated legal action pertaining to the water meters; and (7) the identity of consultants hired by the city regarding the water meters.¹ You state the city has released some of the requested information. You also state the city does not have information responsive to portions of the requests. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of

¹We note that the city asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.² Further, you state release of the submitted information may implicate the proprietary interests of Johnson. You represent you have notified Johnson of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Johnson explaining why its submitted information should not be released. Therefore, we have no basis to conclude that Johnson has a protected proprietary interest in the submitted information, and the city may not withhold it on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

Section 552.022(a)(1) provides for the required public disclosure of "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). We note portions of the submitted information, which we have marked, consist of completed reports made for or by the city that are subject to section 552.022(a)(1). You claim the marked reports are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and are not "other law" for purposes of section 552.022(a)(1). *See id.* § 552.007; *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. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the marked reports under section 552.103, section 552.107, or section 552.111 of the Government Code. We note, however, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will address the applicability of the attorney-client

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

privilege under rule 503 of the Texas Rules of Evidence, the consulting expert privilege under rule 192.3 of the Texas Rules of Civil Procedure, and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure to the marked reports. We will also address your claims under sections 552.103, 552.107, and 552.111 of the Government Code for the information that is not subject to section 552.022(a)(1).

You claim some of the marked reports may be withheld pursuant to the consulting expert privilege, which is found in rule 192.3(e) of the Texas Rules of Civil Procedure. Rule 192.3(e) provides a party to litigation is not required to disclose the identity, mental impressions, and opinions of a consulting expert whose mental impressions or opinions have not been reviewed by a testifying expert. TEX. R. CIV. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” *Id.* 192.7(d).

The city informs us it contracted with a consulting expert for services in anticipation of and preparation for litigation involving the city’s water meters. Furthermore, you indicate the consulting expert has been retained solely for consultation and will not testify at trial, and testifying experts have not reviewed the consulting expert’s work. Upon review, we find the consultant’s reports we have marked reveal the consulting expert’s identity and mental impressions or opinions. Accordingly, the marked consultant’s reports are privileged under rule 192.3(e) of the Texas Rules of Civil Procedure, and the city may withhold them on that basis.³

You assert the remaining marked reports are privileged under Texas Rule of Evidence 503(b)(1), which 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;

³As our ruling is dispositive as to this information, we need not address your remaining arguments against disclosure its disclosure.

(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 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 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).

In this instance, the remaining marked reports, which are subject to section 552.022 of the Government Code, are attached to an e-mail you claim is a privileged attorney-client communication. You state this e-mail is between a city attorney and a city consultant for the purpose of the rendition of professional legal services to the city. You explain the communication at issue was intended to be and has remained confidential. Based on your representations and our review, we agree that the remaining reports are contained within an attorney-client communication that is privileged under rule 503. Therefore, the city may generally withhold this information under rule 503. However, to the extent the remaining reports also exist separate and apart from the submitted privileged communication, the city may not withhold this information under rule 503. As you claim no further exceptions for this information, to the extent the remaining reports exist separate and apart from the privileged attorney-client communication, the city must release them.

We now address your argument against disclosure of the information that is not subject to section 552.022 under section 552.103, which provides 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 the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You claim the information that is not subject to section 552.022 is excepted under section 552.103 because it relates to reasonably anticipated litigation. You explain the city discovered a potential defect in its water meters that may be a breach of warranty. You state that, prior to the city's receipt of the present requests for information, the city authorized the city attorney to hire consulting experts to help the city investigate the potential problems with the water meters and determine whether to pursue litigation related to the potentially defective water meters. Further, you state the city “has actively investigated potential claims and causes of action, talked to attorneys and consulting experts, all with a view towards instituting potential litigation.” Based on your representations and our review, we conclude the city reasonably anticipated litigation when it received the requests for information. You state the information at issue is related to the anticipated litigation because it pertains to the subject matter of the anticipated litigation. Accordingly, we find the city may withhold the information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103(a) of the Government Code.⁴

⁴As our ruling is dispositive as to this information, we need not address your remaining arguments against disclosure its disclosure.

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a). Further, we note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city may withhold the marked consultant's reports under rule 192.3(e) of the Texas Rules of Civil Procedure. The city may withhold the remaining reports subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. However, to the extent the remaining reports also exist separate and apart from the submitted privileged communication, the city may not withhold the remaining reports under rule 503, and must release this information. The city may withhold the information that is not subject to section 552.022(a)(1) of the Government Code 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, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/bs

Ref: ID# 425671

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Johnson Controls
c/o Mr. Terry Jacobson
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For City of Corsicana
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