



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 3, 2012

Ms. Donna L. Johnson  
Olson & Olson LLP  
Wortham Tower Suite 600  
2727 Allen Parkway  
Houston, Texas 77019-2133

OR2012-00071

Dear Ms. Johnson:

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# 441239 (Ref: CLS – Aulds).

The City of Clear Lake Shores (the "city"), which you represent, received a request for a specified investigation report. You claim the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the information you submitted.

We note most of the submitted information consists of an investigation report that falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). We note the city does not claim section 552.108. Sections 552.107(1) and 552.111 of the Government Code, which the city does claim, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.107(1) and 552.111 are not confidentiality provisions for purposes of section 552.022(a)(1). Therefore, the city may not withhold the submitted investigation report under sections 552.107(1) or 552.111. The

Texas Supreme Court has held, however, that the Texas Rules of Evidence are other law that makes information confidential for purposes of section 552.022(a)(1). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, which the city claims under section 552.107(1), also is found at Texas Rule of Evidence 503. Therefore, we will determine whether the city may withhold the investigation report under rule 503. We also will consider the city's claims under sections 552.107(1) and 552.111 for the submitted information that is not subject to section 552.022(a)(1).

Texas Rule of Evidence 503 enacts 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend the investigation report is a communication made for the purpose of facilitating the rendition of professional legal services to the city. You explain the city retained the law firm of Davidson & Troilo, P.C. to conduct an investigation of a complaint of nepotism filed by a member of the city council against the city administrator and a former captain of the city's police department. You state the resulting investigation report was intended to be and remains confidential. Based on your representations and our review of the information at issue, we conclude the city may withhold the investigation report under Texas Rule of Evidence 503. *See 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).

Next, we address your claim under section 552.107(1) of the Government Code for the rest of the submitted information. Section 552.107(1) protects information that comes within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107(1) is the same as the test discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate the information constitutes or documents a communication. Second, the communication must have been made "for the 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." *See* ORD 676 at 6-11. You also indicate the remaining information is a confidential attorney-client communication made in connection with the rendition of professional legal services to the city. Based on your representations and our review of the information at issue, we conclude the city may withhold the remaining information under section 552.107(1) of the Government Code.<sup>1</sup>

In summary, the city may withhold (1) the investigation report under Texas Rule of Evidence 503 and (2) the rest of the submitted information under section 552.107(1) 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.

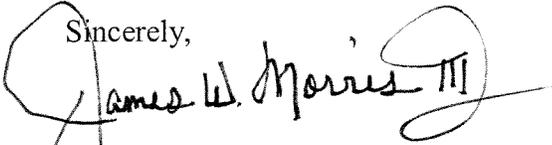
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php),

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<sup>1</sup>As we are able to make this determination, we need not address your claim under section 552.111 of the Government Code.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

Ref: ID# 441239

Enc: Submitted documents

c: Requestor  
(w/o enclosures)