



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 6, 2012

Ms. Constance K. Acosta  
Ross, Banks, May, Cron & Cavin, P.C.  
2 Riverway, Suite 700  
Houston, Texas 77056

OR2012-00276

Dear Ms. Acosta:

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# 441714 (City's File Request Nos.: W000917-101411, W000930-101811).

The City of Friendswood (the "city"), which you represent, received two requests for information related to an investigation of a specified incident, including cost estimates or invoices for the investigative services. You claim that the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.<sup>1</sup> We have considered your claims and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to item two of the first request pertaining to cost estimates or invoices for the investigative services related to the specified incident. To the extent any information responsive to this portion of the request existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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<sup>1</sup>Although you also raise section 552.103 of the Government Code as an exception to disclosure of the submitted information, you have provided no arguments regarding the applicability of this section. We, therefore, assume you no longer assert section 552.103. *See* Gov't Code §§ 552.301(b), (e), .302.

We next note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

(1) 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). Some of the submitted information consists of a completed investigation that was made by or for the city. The investigation, which you have labeled as Exhibits D, E, and F, is subject to section 552.022(a)(1). The city must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law.<sup>2</sup> *See id.*

Although you claim the investigation is subject to sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions that do not make information confidential under the Act and may be waived. *See* Open Record 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 information subject to section 552.022 under section 552.107 or section 552.111 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5 for the information subject to section 552.022. We also will consider your arguments under sections 552.107 and 552.111 for the information not subject to section 552.022, which you have labeled as Exhibit C.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) 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:

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<sup>2</sup>The city does not raise section 552.108 as an exception to disclosure.

(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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the city manager, at the direction of the city's outside counsel, used the services of a named individual to conduct an investigation into an incident involving a city council member and a city employee. You explain the investigation was used by the city's outside counsel to provide legal services to the city. Based on your representations and our review of the information at issue, we find the information from the completed investigation, which you have marked as Exhibits D-F, is privileged under rule 503 of the Texas Rules of Evidence. *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). Accordingly, the city may withhold this information under rule 503.

We now turn to your arguments for the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above.

You state the information in Exhibit C consists of a communication between the city's outside counsel and the city manager that was made for the purpose of facilitating the rendition of professional legal services to the city. You state this communication was made in confidence and its confidentiality has been maintained. Based on your representations and our review, we conclude the city may withhold the information at issue under section 552.107(1) of the Government Code.

In summary, the city may withhold the information from the completed investigation, which you have marked as Exhibits D, E, and F, under rule 503 of the Texas Rules of Evidence. The city also may withhold the information in Exhibit C under section 552.107(1) of the Government Code.<sup>3</sup>

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments.

Ref: ID# 441714

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)