



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 23, 2012

Mr. Dick H. Gregg, III  
Attorney for City of Kemah  
Gregg & Gregg, PC  
16055 Space Center Boulevard, Suite 150  
Houston, Texas 77062

OR2012-04282

Dear Mr. Gregg:

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# 448791.

The City of Kemah (the "city"), which you represent, received a request for the city's record retention policy and bills, invoices, payments, and agreements concerning any attorney, including a named attorney, during a specified time period. You state some of the responsive records were previously destroyed according to the city's record retention policy.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

We first note you have not submitted the requested records retention policies and attorney agreements or any information concerning the named attorney. To the extent this information existed on the date the city received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990).

If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), 302.

Next, we understand you to argue portions of the submitted information are not responsive to the request because they are internal notations. However, the requestor seeks bills and invoices from any attorney to the city. Thus, any information found on such documents is responsive to the request. Therefore, we find the information you have marked is responsive. As you raise no exceptions to disclosure for the information you have marked as non-responsive, it must be released to the requestor.

We next note the submitted information consists of attorney fee bills subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for the 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 it is "made confidential under [the Act] or other law[.]" *Id.* § 552.022(a)(16). Although you raise section 552.107 of the Government Code for this information, this is a discretionary exception that may be waived and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 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), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.107 does not make information confidential for the purposes of section 552.022(a)(16), and the city may not withhold any of the submitted information on that basis. However, the Texas Supreme Court has held the Texas Rules of Evidence 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 therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

Texas Rule of Evidence 503(b)(1) 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 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 assert the portions of the submitted fee bills you have marked are privileged under rule 503. You state the marked information reveals communications made in furtherance of the rendition of legal services, and were intended to be, and have remained, confidential. However, you have failed to identify the parties to the communications in the fee bills. *See Open Records Decision No. 676 at 8 (2002)* (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). *See generally* Gov’t Code § 552.301(e)(1(A)); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Nevertheless, upon review, we are able to discern from the face of the documents that certain individuals are privileged parties. Accordingly, we conclude the city may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, the remaining information you have marked concerns communications with non-privileged parties or individuals you have not demonstrated are privileged parties, does not reveal the content of a communication, or reveals the creation of a document but does not reflect whether the document was communicated. Thus, you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information you seek to withhold. Consequently, the city may not withhold any of the remaining information in Exhibit C under Texas Rule of Evidence 503. As you

raise no additional exceptions for the remaining responsive information in Exhibit C, it 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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID # 448791

Enc. Submitted documents

c: Requestor  
(w/o enclosures)