



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 13, 2012

Mr. Richard L. Bilbie  
Assistant City Attorney  
City of Harlingen  
P.O. Box 2207  
Harlingen, Texas 78551

OR2012-10897

Dear Mr. Bilbie:

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# 458770.

The City of Harlingen (the "city") received a request for any messages, e-mails, requests, and documents between the city attorney's office and a named individual's office for a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains an agenda and minutes related to a public meeting of the Harlingen Elective Commission. The agenda and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). You seek to withhold this information under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records

Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Furthermore, although you raise common-law privacy for this information, a specific statutory right of access also prevails over the common law. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Accordingly, the submitted agenda and minutes of the public meeting, which we have marked, must be released pursuant to section 551.022 of the Government Code.

Next, we note some of the remaining information, which we have marked, is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(3). Although you seek to withhold this information under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code, we note these are discretionary exceptions to disclosure that protects a governmental body’s interests and may be waived. *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. 663 (1999) (governmental body may waive section 552.111), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, sections 552.103, 552.107, 552.108, and 552.111 do not make information confidential for purposes of section 552.022(a)(3), and the city may not withhold this information on those bases. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and 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). The attorney-client privilege is found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is found under rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertions of the attorney-client privilege under Texas Rule of Evidence 503 and the work product privilege under Texas Rule of Civil Procedure 192.5. Additionally, because section 552.101 of the Government Code can make information confidential, we will address the applicability of this exception to the information subject to section 552.022.

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 assert the information subject to section 552.022 of the Government Code is protected from disclosure by Texas Rule of Evidence 503. You state the information at issue consists of confidential communications between the city and the city's special prosecutor. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state these communications were intended to be, and have remained, confidential. Accordingly, the city may withhold the information subject to section 552.022, which we have marked, on the basis of the attorney-client privilege under Texas Rule of Evidence 503.<sup>1</sup>

We will now address your arguments against disclosure of the remaining information not subject to section 552.022 of the Government Code. Section 552.108(a)(1) of the

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information relates to a pending criminal prosecution. You note that although this case has gone to trial and a conviction was obtained, the case is currently on appeal. Based upon your representations and our review, we conclude that release of the remaining information not subject to section 552.022 of the Government Code would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the city may withhold the remaining information not subject to section 552.022 under section 552.108(a)(1) of the Government Code.

In summary, the submitted agenda and minutes of the public meeting, which we have marked, must be released pursuant to section 551.022 of the Government Code. The city may withhold the information subject to section 552.022 of the Government Code, which we have marked, on the basis of the attorney-client privilege under Texas Rule of Evidence 503. The city may withhold the remaining information not subject to section 552.022 under section 552.108(a)(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), 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/bhf

Ref: ID# 458770

Enc. Submitted documents

c: Requestor  
(w/o enclosures)