



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2012

Mr. Roger E. Gordon
Counsel for the City of Woodcreek
The Law Office of Roger Gordon
Building One, Suite 300
901 South Mopac Expressway
Austin, Texas 78746

OR2012-12466

Dear Mr. Gordon:

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# 461612 (WC No. 12-001).

The City of Woodcreek (the "city"), which you represent, received a request for any bills submitted by the city attorney during a specified time period and two categories of information pertaining to the "Wimberly Water Talks." The city also received a second request from the same requestor for any documents, notes, or other communications that provide specified information related to these water talks.¹ You inform us that most of the requested information will be released. You claim Exhibits D through H are excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the information in Exhibit D includes a city ordinance. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 2-3 (1990) (laws or ordinances are open records, 221 at 1 (1979) (official records

¹You inform us that the city sought and received clarification of the second request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

of governmental body's public proceedings are among most open of records). Therefore, the city ordinance in Exhibit D, which we have marked, must be released.

Next, we note some of the information in Exhibit D is subject to section 552.022(a)(3) of the Government Code, which 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 it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(3). Although you raise section 552.107(1) of the Government Code for this information, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* 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). Therefore, the city may not withhold the information at issue, which we have marked pursuant to section 552.022(a)(3) of the Government Code, under section 552.107(1) of the Government Code. However, we note the attorney-client privilege encompassed by section 552.107(1) is also found in Texas Rule of Evidence 503. The Texas Supreme Court has held the 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). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information in Exhibit D that is subject to section 552.022(a)(3) of the Government Code. We will also consider your arguments under section 552.107(1) for the remaining information in Exhibit D and Exhibits E through H, which are not subject to section 552.022(a)(3).

We first address your assertion of the attorney-client privilege for the information in Exhibit D that is subject to section 552.022(a)(3) of the Government Code. Texas Rule of Evidence 503 encompasses 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:

- (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, orig. proceeding).

You inform us that the information at issue is an attachment to a communication between the city attorney, city officials, and privileged third parties that was made for the purpose of facilitating the rendition of professional legal services to the city. You also inform us that this communication was intended to be confidential and has remained confidential. We note, however, the information at issue was sent to a non-privileged party. Therefore, this non-privileged communication, which we have marked, may not be withheld under Texas Rule of Evidence 503. As no other exceptions to disclosure are raised for the information in Exhibit D that is subject to section 552.022(a)(3) of the Government Code, it must be released.

Next, we consider your argument under section 552.107(1) of the Government Code for the remaining information, which is not subject to section 552.022(a)(3). Section 552.107(1) also protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the remaining information consists of communications between the city attorney, the city’s outside counsel, city officials, city employees, and privileged third parties that were made for the purpose of facilitating the rendition of professional legal services to the city. You also inform us that these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we conclude the

remaining information generally constitutes privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code. However, the information at issue includes an e-mail that was sent to a non-privileged party. Therefore, to the extent this non-privileged e-mail, which we have marked, exists separate and apart from the privileged communications, it may not be withheld under section 552.107(1). If this information does not exist separate and apart from the privileged communications, the city may withhold it under section 552.107(1).

We note the non-privileged e-mail we have marked in Exhibit D contains an e-mail address that is subject to section 552.137 of the Government Code.² This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Accordingly, the e-mail address we have marked in the non-privileged e-mail in Exhibit D is not specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release. *See id.* § 552.137(b).

In summary, except for the city ordinance we have marked in Exhibit D, the information in Exhibit D we have marked pursuant to section 552.022(a)(3) of the Government Code, and the non-privileged e-mail we have marked in Exhibit D, the city may withhold the submitted information under section 552.107(1) of the Government Code. To the extent the non-privileged e-mail we have marked in Exhibit D exists separate and apart from the privileged communications, it may not be withheld under section 552.107(1) of the Government Code. If this information does not exist separate and apart from the privileged communications, the city may withhold it under section 552.107(1) of the Government Code. The e-mail address we have marked in the non-privileged e-mail in Exhibit D must be withheld under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release. The remaining information must be released.

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,

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, appearing to read 'KLC', with a long horizontal flourish extending to the right.

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 461612

Enc. Submitted documents

c: Requestor
(w/o enclosures)