



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 9, 2013

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

OR2013-11614

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# 492612.

The City of Kemah (the "city"), which you represent, received a request for certain billing records and payment records from the city to an attorney for services over a specified period of time. You state you have released the payment records with redactions under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You further state the city provided the requestor with some of the responsive invoices in response to a prior request for information. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitive or redundant requests for information). You also state some of the responsive billing records were previously destroyed according

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including routing and bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in subsection 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(e). Thus, the statutory amendments to section 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsection 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

to the city's record retention policy.<sup>2</sup> You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we 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[.]" Gov't Code § 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 consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

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:

- (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

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<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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).

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. 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. *Id.* Upon a demonstration of all three factors, the entire communication is 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 information you have marked in the fee bills contain confidential communications between the city's attorney and the city's staff. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city and have remained confidential. Based on your representations and our review, we find 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. ORD 676 at 8 (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). Additionally, some of the information you have marked does not indicate it was communicated. Therefore, we find you have failed to demonstrate that any of the remaining information at issue documents privileged attorney-client communications. Accordingly,

none of the remaining information may be withheld under Texas Rule of Evidence 503 and it 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to be 'Thana Hussaini', written over a circular stamp or mark.

Thana Hussaini  
Assistant Attorney General  
Open Records Division

TH/som

Ref: ID# 492612

Enc. Submitted documents

c: Requestor  
(w/o enclosures)