



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2013

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2013-12543

Dear Ms. Ramirez:

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# 493846.

The Lower Colorado River Authority (the "authority") received a request for any recommendations, analysis, memos, or reports by authority staff regarding the possible purchase of land owned by a named company for a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.107, 552.110, 552.111, 552.113, 552.117, 552.133, and 552.137 of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of Alcoa, Inc. ("Alcoa") and Luminant Generation Company, LLC ("Luminant"). Accordingly, you notified these third parties of the request and of their right to submit arguments to this office explaining why the information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Alcoa and Luminant. We have

¹We note raise section 552.024 of the Government Code, which is not an exception to disclosure under subchapter C of the Act. Section 552.024 enables an official or employee of a governmental body to request confidentiality for information protected by section 552.117(a)(1) of the Government Code. *See Gov't Code* § 552.024.

considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note portions of the submitted information are 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 this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 522.108[.]

Gov't Code § 552.022(a)(1). The information in Exhibit 10 and a portion of Exhibit 12 consist of completed reports subject to section 552.022. The authority must release the completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise sections 552.105, 552.107, 552.111, and 552.113 of the Government Code for this information, these sections are discretionary exceptions to disclosure and do 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), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 6-7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).* As such, these sections do not make information confidential for the purposes of section 552.022. Therefore, none of the information subject to section 552.022 may be withheld under sections 552.105, 552.107, 552.111, or 552.113 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. You raise section 552.104 of the Government Code for the information subject to section 552.022. We note information subject to section 552.022 may be withheld under section 552.104(a). *See Gov't Code § 552.104(b) (information protected by Gov't Code § 552.104 not subject to required public disclosure under section 552.022(a)).* You also claim the information subject to section 552.022 is protected from disclosure under sections 552.101 and 552.110 of the Government Code which can make information confidential for purposes of section 552.022. Thus, we will consider your arguments under sections 552.101, 552.104 and 552.110 for the

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information subject to section 552.022. Additionally, we will consider all your arguments for the information not subject to section 552.022.

Next, we will address your arguments for the completed reports subject to section 552.022. 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 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).

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 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. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You assert the completed reports consists of communications between the authority's staff, representatives, legal counsel, outside counsel, and environmental consultants. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the authority and have remained confidential. Based on your representations and our review, we find the authority has established the completed reports constitute attorney-client communications under rule 503. Thus, the authority may withhold the completed reports under Texas Rule of Evidence 503.³

Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed above for rule 503. 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. 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 claim the remaining information is protected by section 552.107(1) of the Government Code. You state the remaining information consists of communications between the authority's staff, representatives, legal counsel, outside counsel, and environmental consultants. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the authority and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information. Thus, the authority may withhold the remaining information under section 552.107(1) of the Government Code.⁴

In summary, the authority may withhold Exhibit 10 and the completed reports in Exhibits 12 subject to section 552.022 of the Government Code under Texas Rule of Evidence 503. The authority may withhold the remaining information under section 552.107(1) of the Government Code.

³As our ruling is dispositive with respect to the information at issue, we need not address your remaining arguments against its disclosure.

⁴As our ruling is dispositive, we need not address the remaining arguments raised against its disclosure.

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, 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 493846

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Roger P. Nevola
Counsel for Alcoa Inc.
Law Offices of Roger P. Nevola
P.O. Box 2103
Austin, Texas 78768-2103
(w/o enclosures)

Mr. William A. Moore
Counsel for Luminant Generation Company
Enoch Keever, PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
(w/o enclosures)