



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2014

Mr. Les Trobman
General Counsel
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

OR2014-12753

Dear Mr. Trobman:

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# 530381.

The Texas Water Development Board (the "board") received a request for any and all fee bills submitted to the board from three specified law firms during a specified time period, as well as information pertaining to any payments based on those fee bills. You state the board is releasing some of the requested information in reliance on the previous determination in Open Records Letter No. 2013-12435 (2013). You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have submitted information pertaining to only one of the specified law firms. To the extent any information responsive to the remainder of the request existed on the date the board received the request, we assume the board has released it. If the board has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the board's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). We note you did not raise rule 192.5 of the Texas Rules of Civil Procedure or sections 552.111 and 552.136 of the Government Code within that time. Thus, the board failed to comply with the requirements mandated by subsection 552.301(b) as to its claims under rule 192.5 of the Texas Rules of Civil Procedure and under sections 552.111 and 552.136 of the Government Code. Generally, if a governmental body fails to timely raise an exception or a privilege, that exception or privilege is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). The attorney work-product privilege under section 552.111 of the Government Code or under rule 192.5 of the Texas Rules of Civil Procedure is discretionary and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (attorney work-product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general). Therefore, in failing to timely raise these arguments for the requested information, the board has waived them and may not withhold any of the submitted information on this basis. However, because sections 552.130 and 552.136 of the Government Code make information confidential under the Act, we will consider these sections.¹ Additionally, we will consider the board's timely-raised arguments.

Next, we note, and you acknowledge, the submitted information is 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:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The submitted information consists of attorney fee bills subject to section 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* Although you raise the attorney-client privilege under section 552.107 of the Government Code for this information,

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.107 is a discretionary exception and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 subject to waiver), 665 at 2 n.5. Therefore, the board may not withhold the submitted information under section 552.107. However, 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). Additionally, as noted above, sections 552.130 and 552.136 of the Government Code make information confidential under the Act. Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and sections 552.130 and 552.136 of the Government Code for the submitted information.

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).

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 contend the attorney-client privilege is applicable to the entirety of the information in some of the submitted attorney fee bills. Alternatively, you seek to withhold under the privilege the portions of the fee bills you have marked. We note section 552.022(a)(16) provides information “that is *in* a bill for attorney’s fees” is not excepted from disclosure unless the information is confidential under the Act or other law or protected by the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). Thus, by its express language, section 552.022(a)(16) does not permit an attorney fee bill to be withheld in its entirety. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in its entirety on basis it contains or is attorney-client communication pursuant to language in Gov’t Code § 552.022(a)(16)), 589 (1991) (information in attorney fee bill is excepted only to extent it reveals client confidences or attorney’s legal advice). Accordingly, we will determine whether the board may withhold the information you have marked in the fee bills.

You assert the information you have marked consists of privileged attorney-client communications between counsel for the board, representatives of the board, and consultants for the board. You state the communications at issue were made for the purpose of the rendition of legal services to the board. You also state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review, we find some of the information constitutes attorney-client communications under rule 503. Therefore, the board may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. However, we find the remaining information at issue documents communications with individuals whom you have not identified as privileged parties, or the information does not reveal the content of a communication for purposes of rule 503. Thus, you have not demonstrated how the remaining information at issue documents a privileged attorney-client communication under rule 503, and none of the remaining information may be withheld on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s or driver’s license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov’t Code § 552.130(a). Upon review, we conclude the board must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is

collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Upon review, we find the board must withhold the information you have marked, in addition to the information we have marked, under section 552.136 of the Government Code.

In summary, the board may withhold the information we have marked pursuant to Texas Rule of Evidence 503. The board must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. Finally, the board must withhold the information you have marked, in addition to the information we have marked, under section 552.136 of the Government Code. 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.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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/tch

Ref: ID# 530381

Enc. Submitted documents

c: Requestor
(w/o enclosures)