



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 11, 2014

Mr. Alan T. Ozuna  
Counsel for the City of Pharr  
Denton, Navarro, Rocha, Bernal, Hyde & Zech, P.C.  
701 East Harrison, Suite 100  
Harlingen, Texas 78550-9165

OR2014-22489

Dear Mr. Ozuna:

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# 546704 (RefNos. PIR-2014-214, PIR-2014-215, PIR-2014-216, PIR-2014-217, and PIR-2014-218).

The City of Pharr (the "city"), which you represent, received five requests from the same requestor for ten categories of information pertaining to a specified lawsuit, a certain law firm, and several named individuals. You state the city does not have any information responsive to four of the categories of requested information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.136 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>Although you originally raised sections 552.101 and 552.108 of the Government Code, you have not submitted arguments explaining how these sections apply to the requested information. Therefore, we assume you have withdrawn these claims. *See* Gov't Code §§ 552.301, .302.

<sup>3</sup>We 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of 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; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(16), (17). The information submitted as Exhibit C consists of attorney fee bills subject to section 552.022(a)(16), and the information submitted as Exhibit B contains court-filed documents subject to section 552.022(a)(17). The city must release this information unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(16), (17). Although you assert the court-filed documents in Exhibit B are excepted from disclosure under section 552.103 of the Government Code and the information you have marked in Exhibit C is excepted from disclosure under section 552.107(1) of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See 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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the court-filed documents we have marked in Exhibit B under section 552.103 of the Government Code. As you have not claimed any other exceptions to disclosure for this information, the city must release the marked court-filed documents in Exhibit B. Likewise, the city may not withhold the information you have marked in Exhibit C subject to section 552.022(a)(16) under section 552.107(1) of the Government Code. However, the attorney-client privilege is also found under 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 marked portions of the attorney fee bills in Exhibit C.

Texas Rule of Evidence 503(b)(1) 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. 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 communication 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 attaches to complete communication, including factual information).

You state the submitted attorney fee bills contain confidential communications between attorneys for the city and city officials and employees. You indicate these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state the fee bills have remained confidential. Upon review, we find the city has established some of the information in Exhibit C, which we have marked, constitutes

privileged attorney-client communications the city may withhold under Texas Rule of Evidence 503. However, we conclude the city has not established the remaining information you marked in Exhibit C consists of privileged attorney-client communications. Therefore, the city may not withhold any of the remaining information you marked in Exhibit C under Texas Rule of Evidence 503.

We now address your arguments for the remaining information not subject to section 552.022. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed 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 state the information in Exhibit D consists of confidential communications between attorneys for the city and city officials and employees. You indicate these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state the communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit D. Accordingly, the city may withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to

withhold. To meet this burden, the governmental body must demonstrate (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). See Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, prior to the city's receipt of the instant request, a lawsuit styled *Jane Doe v. City of Pharr*, Cause No. 7:14-CV-285, was filed and is currently pending against the city in the United States District Court for the Southern District of Texas, McAllen Division. Therefore, we agree litigation involving the city was pending on the date the city received the present request for information. You also state the remaining information in Exhibit B not subject to section 552.022(a)(17) pertains to the substance of the lawsuit. Based on your representations and our review, we find the remaining information in Exhibit B is related to the pending litigation. We note, however, the information at issue was obtained from or provided to the opposing party in the pending litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the city may not withhold the remaining information in Exhibit B under section 552.103 of the Government Code.

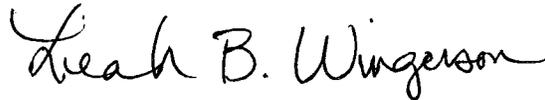
Section 552.136 of the Government Code states, “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); see *id.* § 552.136(a) (defining “access device”). Accordingly, we find the city must withhold the bank account and routing numbers you have marked in Exhibit E under section 552.136 of the Government Code.

In summary, the city may withhold the information we have marked in Exhibit C under Texas Rule of Evidence 503. The city may withhold Exhibit D under section 552.107(1) of the Government Code. The city must withhold the bank account and routing numbers you have marked in Exhibit E under section 552.136 of the Government Code. The city must release the remaining information.

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 that reads "Leah B. Wingerson". The signature is written in a cursive style with a large initial "L".

Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/bhf

Ref: ID# 546704

Enc. Submitted documents

c: Requestor  
(w/o enclosures)