



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 23, 2016

Mr. David T. Ritter
Counsel for the City of Keene
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2016-04320

Dear Mr. Ritter:

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# 602183.

The City of Keene (the "city"), which you represent, received a request for the billing from the city's attorney for the year 2015. You state the city did not have information responsive to a portion of the request when the request was received.¹ You claim some of the submitted information is privileged under Texas Rule of Evidence 503.² We have considered your argument and reviewed the submitted information.

Initially, you inform us the city will withhold or release most of the requested information in accordance with Open Records Letter Nos. 2016-02490 (2016), 2016-01813 (2016), 2015-24410 (2015), 2015-21403 (2015), and 2015-14417 (2015). In Open Records Letter

¹The 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).

²Although you also raise section 552.022 of the Government Code, we note section 552.022 is not an exception to disclosure under the Act. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See Gov't Code* § 552.022.

Nos. 2016-02490, 2016-01813, and 2015-14417, we determined the city may withhold the information we marked under Texas Rule of Evidence 503 and must release the remaining information at issue. In Open Records Letter Nos. 2015-24410 and 2015-21403, we determined, with the exception of the information we marked for release, the city may withhold the information it marked under Texas Rule of Evidence 503, and must release the remaining information at issue. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the requested information is identical to the information previously submitted and ruled on by this office, the city must continue to rely on Open Records Letter Nos. 2016-02490, 2016-01813, 2015-24410, 2015-21403, and 2015-14417 as previous determinations and withhold or release the information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address your argument against release of the submitted information that is not encompassed by those rulings.

Next, you state the billing from the city's attorney for September 2015 and November 2015 is not the subject of a previous request for information and you now seek a ruling on this information. We further note the billing from the city's attorney for July 2015 was not at issue in any of the previous rulings discussed above. However, you have not submitted the billing from the city's attorney for July 2015 or November 2015. Thus, to the extent such information existed and was maintained by the city on the date the city received the request for information, we presume the city has released it. If not, the city must do so. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

We note the remaining submitted information consists of an attorney fee bill that is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for 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 the information is confidential under the Act or other law. Gov't Code § 552.022(a)(16). 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). Thus, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* Open Records Decision No. 676 (2002). 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 assert portions of the submitted fee bill should be withheld under rule 503. You state the information at issue reveals communications between attorneys for the city and city officials and employees that were made for the purpose of facilitating the rendition of professional legal services. You state the city has not waived the attorney-client privilege with regard to the communications. Upon review, we find the city may withhold the information we have marked under Texas Rule of Evidence 503. However, some of the communications are with individuals you have not demonstrated are privileged parties. We note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have not

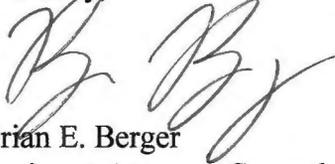
demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the city may not withhold the remaining information at issue on that basis.

In summary, the city must continue to rely on Open Records Letter Nos. 2016-02490, 2016-01813, 2015-24410, 2015-21403, and 2015-14417 as previous determinations and withhold or release the identical information in accordance with those rulings. The city may withhold the information we have marked under Texas Rule of Evidence 503. 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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 602183

Enc. Submitted documents

c: Requestor
(w/o enclosures)