



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 23, 2022

Ms. Lauren Downey
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2022-25523

Dear Ms. Downey:

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# 967185 (PIR No. R012828).

The Office of the Attorney General (the "OAG") received a request for invoices or other financial records regarding specified topics during a stated time period. The OAG states it will release some of the requested information. The OAG claims some of the submitted information is privileged under Texas Rule of Civil Procedure 192.3 and Texas Rule of Evidence 503. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, the OAG acknowledges, and we agree, the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

¹ 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 that those records contain substantially different types of information than that submitted to this office.

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The OAG must release information subject to section 552.022(a)(3) unless it is made confidential under the Act or other law. The Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the OAG's arguments.

Texas Rule of Civil Procedure 192.3 provides the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." *Id.* 192.7.

The OAG informs us portions of the submitted information reveal the identity of a consulting-only expert hired to assist the OAG in a matter in which the OAG anticipated litigation. The OAG states "[the expert at issue has] not testified, their identity has not been disclosed in any pleadings or discovery, and their work has not been reviewed by a testifying expert." Based upon these representations and our review, we find the information at issue identifies the OAG's consulting expert. Accordingly, we find the OAG may withhold the identifying information it marked pursuant to rule 192.3(e).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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).

The OAG states the information it marked constitutes communications between the OAG's consulting expert, outside counsel engaged by the OAG, and the OAG that were made for the purpose of facilitating the rendition of professional legal services to the OAG. Additionally, the OAG informs us the communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the OAG may withhold the information it marked under rule 503.

In summary, the OAG may withhold the information it marked pursuant to Texas Rule of Civil Procedure 192.3(e). The OAG may withhold the information it marked under Texas Rule of Evidence 503. The OAG 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open

Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/eb

Ref: ID# 967185

Enc. Submitted documents

c: Requestor
(w/o enclosures)