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Via Public Information Act Electronic Filing System

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

**Re: Requestor's Comments Under Texas Government Code § 552.304
City of Fort Worth Public Information Request No. R006830-071426**

Dear Open Records Division:

I am the requestor in the above-referenced matter. Pursuant to section 552.304 of the Texas Government Code, I submit these comments opposing the City of Fort Worth's request to withhold the remaining responsive records in their entirety under section 552.107 and Texas Rule of Evidence 503.

I recognize that the City may withhold a communication that it demonstrates is genuinely protected by the attorney-client privilege. My objection is to the City's apparent blanket treatment of all remaining responsive records as privileged without supplying the specific facts required to establish the privilege.

1. My request primarily seeks official governmental actions and operative records, not confidential legal advice.

The request seeks records showing whether the completed Woodhaven Conservation Plan was formally or administratively adopted, approved, accepted, incorporated, assigned for implementation or relied upon by the City. The requested records expressly include ordinances, resolutions, Mayor and Council Communications, agenda items, meeting minutes, motions, votes, orders, memoranda, administrative actions, implementation directives and official planning, budgeting and policy documents.

These are the records through which a governmental body acts, establishes policy, assigns responsibility and documents official decisions. They do not become attorney-client communications merely because an attorney reviewed them, received a copy of them or discussed them with City personnel.

The request's sixth category may encompass some privileged requests for or communications providing legal advice. But it also encompasses nonprivileged records discussing the authority for using the Conservation Plan, including administrative memoranda, public presentations,

policy documents and communications involving nonprivileged third parties. Each record must therefore be evaluated individually.

2. The City's brief recites the elements of the privilege but does not provide the necessary record-specific facts.

Open Records Decision No. 676 provides that the governmental body bears the burden of supplying the facts necessary to establish the attorney-client privilege. The governmental body must demonstrate that the particular information constitutes or documents a communication; that the communication was made to facilitate professional legal services; that the participants were clients, client representatives, lawyers or lawyer representatives; and that the communication was intended to remain confidential and has remained confidential.

The City's brief does not identify:

- the particular communications being withheld;
- the dates or subject matters of those communications;
- the identities and capacities of the senders and recipients;
- the particular professional legal service being facilitated;
- whether any recipients were outside parties;
- whether the attorneys were acting as legal advisers rather than administrators, managers, planners or policymakers; or
- whether independently existing records were merely transmitted as attachments to an attorney communication.

Instead, the City states generally that the records "include communications to and from attorneys" and that the participants intended confidentiality. Those assertions largely repeat the legal test rather than supplying facts demonstrating its application to each record.

The City's language is also unclear. It first states that "some" enclosed documents "may" be withheld, but ultimately asks to withhold all submitted records in their entirety. This does not establish that every document submitted as Exhibit B is itself a privileged communication.

3. The mere participation of a governmental attorney does not establish privilege.

Governmental attorneys frequently act in nonlegal capacities, including administrative, investigative, managerial and policy-related roles. The privilege does not apply merely because a City attorney authored, received or was copied on a communication.

The City must demonstrate that each communication was made for the purpose of obtaining or providing professional legal services. Communications concerning project administration, meeting preparation, public messaging, policy implementation, scheduling, stakeholder relations, planning decisions or ordinary governmental operations are not necessarily privileged merely because counsel participated.

4. Official records and records subject to section 552.022 cannot be withheld through a generalized invocation of section 552.107.

Section 552.022 identifies numerous categories of information as public unless made confidential under the Act or other law. Potentially applicable categories include:

- completed reports made for or by a governmental body;
- the final record of voting in governmental proceedings;
- statements of general policy or interpretation formulated and adopted by an agency;
- adopted or issued policy statements or interpretations; and
- administrative instructions to staff that affect members of the public.

My request specifically seeks these types of operative and final records.

Section 552.107 is a discretionary exception and does not itself make section 552.022 information confidential. Although Rule 503 may constitute “other law,” the City must still demonstrate that each particular record is itself a confidential attorney-client communication made to facilitate legal services. The involvement of counsel or transmission of an independently existing official record to counsel does not eliminate the City’s obligation to produce the independently maintained public record.

5. Communications involving nonprivileged third parties should be released.

To the extent any submitted records were communicated to or from developers, consultants, private organizations, community groups, members of the public or other outside persons, the City must specifically establish that each outside person was reasonably necessary to the transmission or rendition of professional legal services.

Participation in a planning process, development proposal, conservation-plan process or stakeholder discussion does not by itself establish a privileged attorney-client relationship. Any communication disclosed to an outside party for ordinary planning, policy, public-relations or project-administration purposes was not maintained as a confidential attorney-client communication.

6. Disciplinary Rule 1.05 is not an independent basis for withholding all information.

The City also states that its attorneys are prohibited from disclosing the records under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. However, Open Records Decision No. 676 explains that section 552.107 does not encompass every category of information that may fall within the broader ethical definition of confidential information under Rule 1.05.

The Texas Disciplinary Rules of Professional Conduct are also not independently treated as “other law” for purposes of section 552.022. Accordingly, the City’s reference to Rule 1.05 does not relieve it of establishing the elements of the attorney-client privilege under section 552.107 or Rule 503.

7. My selection of the City's standard exclusion option was not a concession that the requested official records are privileged.

My selection of the portal option allowing standard exclusions and redactions was intended to permit the City to remove information falling within applicable routine exclusion categories. It was not an agreement that every record involving a City attorney is privileged, an agreement that official actions and policy records may be withheld or a waiver of my right to contest the City's application of section 552.107.

Requested determination:

I respectfully request that the Open Records Division:

1. Review the submitted information on a record-by-record basis rather than accepting the City's blanket characterization;
2. Deny withholding for any record the City has not demonstrated is itself a confidential communication made for the purpose of facilitating professional legal services;
3. Require release of ordinances, resolutions, M&Cs, agenda materials, minutes, motions, votes, orders, administrative actions, policy documents, implementation directives and other independently existing official records;
4. Require release of communications involving nonprivileged third parties unless the City specifically establishes why those parties were necessary to providing legal services;
5. Require release of communications in which a City attorney was acting in an administrative, managerial, planning, investigative or policymaking capacity rather than as legal counsel;
6. Require release of independently maintained official documents even if another copy was transmitted to or from an attorney; and
7. Permit withholding only of those particular communications for which the City has established every element of the attorney-client privilege.

The Public Information Act should not permit the City to use attorney involvement to conceal whether the Conservation Plan was ever formally or administratively given official status. If no responsive adoption, implementation or policy records exist, that absence should not be obscured by a generalized assertion of attorney-client privilege.

Respectfully submitted,



Erika Graham
Requestor