



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2010

Ms. Camila Kunau
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2010-08827

Dear Ms. Kunau:

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# 382877 (COSA File No. 10-0490).

The City of San Antonio (the "city") received a request for eleven categories of information related to allegations and investigations during a specified time period, specified investigations from the city's Office of Municipal Integrity, expenses and fees for specified events, and specified audits. You state that you have provided the requestor with information responsive to categories 2 and 11 of the request. You inform us that the information responsive to category 5 of the request does not exist.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.111, and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume the representative sample of records submitted to this office are 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.

submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's comments that the city possesses information responsive to categories 2, 5, and 11 of the request that it did not submit either to this office or to the requestor. The city states that all information responsive to categories 2 and 11 of the request is available on the city's website and will be provided to the requestor. Additionally, the city states that no information responsive to category 5 exists. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d at 266; Open Records Decision No. 555 at 1-2 (1990) (governmental body not required to disclose information that did not exist at time request was received). Whether the city has additional information responsive to categories 2, 5, and 11 that has not been provided to this office or to the requestor is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we must accept the city's representation that it has no additional information responsive to categories 2, 5, or 11 that it has not already provided to this office or to the requestor.

Next, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

(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 under this chapter unless they are expressly confidential under other law:

(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). In this instance, the submitted information includes account spreadsheets, invoices, and vouchers relating to the receipt or expenditure of public funds by the city. This information, which we have marked, is subject to section 552.022(a)(3). You claim this information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and are, therefore, not "other law" for purposes of section 552.022. *See id.* § 552.007; *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. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000)

(discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). As such, sections 552.103, 552.107, 552.108 and 552.111 are not other law that makes information expressly confidential for the purposes of section 552.022, and the information at issue may not be withheld under those sections. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claim under rule 503 of the Texas Rules of Evidence for the information at issue. Additionally, you assert that the information at issue may be subject to sections 552.101, 552.102, and 552.136 of the Government Code, and we note a portion of this information may be subject to section 552.137 of the Government Code. Because these sections constitute "other law" that makes information confidential for the purposes of section 552.022, we will also consider the applicability of sections 552.101, 552.102, 552.136 and 552.137 of the Government Code to the information at issue. Additionally, we will consider the city's claims under sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.111 of the Government Code for the portions of information that are not subject to section 552.022.

You raise rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. Rule 503 encompasses the attorney-client privilege and 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). 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information that is subject to section 552.022 of the Government Code consists of privileged communications you wish to withhold under rule 503. We find, however, that most of the information at issue is financial information that does not constitute communications for purposes of rule 503. Moreover, all the communications in the information at issue appear to be between the city and individuals whom you have not identified as privileged parties under rule 503. Accordingly, we find you have failed to demonstrate that any of the information that is subject to section 552.022 of the Government Code falls within the scope of the attorney-client privilege. We therefore conclude that the department may not withhold any of that information on the basis of Texas Rule of Evidence 503.

You also seek to withhold the information subject to section 552.022 under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the city’s section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code for the portions of the remaining information it has marked under those sections.

In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts, the release of which would

be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find the information at issue consists entirely of financial documents reflecting the expenditure of public funds. Thus, none of this remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city may withhold any of the remaining information under common-law privacy.

Next, you raise section 552.136 of the Government Code for portions of the information subject to section 552.022. Section 552.136 of the Government Code provides, “[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.” *Id.* § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Therefore, the city must withhold the credit card number we have marked in the information at issue under section 552.136. We note you have marked check numbers in the information at issue for which you appear to raise section 552.136. However, upon review of your arguments, we find you have not demonstrated how any of these numbers, whether used alone or in conjunction with another device, may be used to obtain money, goods, or services, or to initiate a transfer of funds. Thus, we find you have failed to demonstrate how these check numbers constitute “access device numbers” for purposes of section 552.136. Therefore, the city must withhold only what we have marked in the information subject to section 552.022 under section 552.136 of the Government Code.

We note the remaining information that is subject to section 552.022 contains an e-mail address that is within the scope section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The personal e-mail address at issue is not specifically excluded by section 552.137(c).³ As such, this e-mail address, which we have marked, must be withheld under section 552.137 unless its owner has affirmatively

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

consented to its release. *See id.* § 552.137(b).⁴ As you raise no further exceptions to the remaining information subject to section 552.022, it must be released.

We next turn to your arguments against disclosure of the information not subject to section 552.022. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the information at issue consists of administrative, personnel, and financial records held by the city. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a representation from the entity with the law enforcement interest (1) stating that entity wishes to withhold the information, and (2) demonstrating the information relates to the pending case. You provide a letter from the Bexar County District Attorney’s Office (the “district attorney”) objecting to release of the submitted information. In this letter, the district attorney objects to the release of any documentation in the city’s files that relates to the investigation at issue and states that disclosure of such information would interfere with the investigation and prosecution of a currently pending criminal case. You also state that the information at issue is “evidence amassed during the development” of the case at issue. Based on these representations and our review, we determine release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct). Therefore, the city may withhold the remaining information not subject to section 552.022 under section 552.108(a)(1) of the Government Code.

In summary, the city must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code. The remaining information that is subject to section 552.022(a)(3) of the Government Code, which we have marked, must be released.

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including credit card numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

The city may withhold the remaining information that is not subject to section 552.022 under section 552.108(a)(1) of the Government Code.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 382877

Enc. Submitted documents

c: Requestor
(w/o enclosures)