



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2010

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam L.L.P.
6000 Western Place Suite 200
I-30 at Bryant-Irvin Road
Fort Worth, Texas 76107-4654

OR2010-18827

Dear Ms. White:

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# 403138.

The City of Weston (the "city"), which you represent, received requests from three requestors for communications and other information relating to the U.S. Department of Justice; the district attorney's or sheriff's offices; the city attorney; the city engineer; the mayor; city council members and meetings; and certain communications, named individuals, and financial and other matters involving the city. You claim the requested information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted. We also have considered comments we received from one of the requestors.¹ We assume the city has released any other information that is responsive to these requests, to the extent such information existed when the city received the requests. If not, then any such information

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

must be released immediately.² See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We first note the submitted information includes a city ordinance and a resolution adopted by the city council. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. See Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolution is analogous to an ordinance. Moreover, the resolution appears to have been adopted at a public meeting of the city council and thus is an official record of a governmental body's public proceedings. See Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Therefore, the ordinance and the resolution we have marked must be released.

We next note other submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are not excepted from required disclosure under [the Act] 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; [and]

...
(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code §§ 552.022(a)(3), (16). In this instance, you claim section 552.107(1) of the Government Code for information in attorney fee bills encompassed by section 552.022(a)(16) and section 552.108 of the Government Code for account and voucher information encompassed by section 552.022(a)(3). We have marked the information encompassed by section 552.022(a)(3) and (16). We note sections 552.107(1) and 552.108 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See *id.* § 552.007; Open Records Decision Nos. 676 at 10-11

²We 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

(2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 could be waived). As such, those sections are not other law that makes information expressly confidential for purposes of section 552.022(a)(3) and (16). Therefore, the city may not withhold any of the marked information encompassed by section 552.022(a)(3) and (16) under section 552.107(1) or section 552.108.

The Texas Supreme Court has held, however, that 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). The attorney-client privilege, which you claim under section 552.107(1), is found at Texas Rule of Evidence 503. Accordingly, we will determine whether the city may withhold any of the information in the attorney fee bills under rule 503. We also note section 552.136 of the Government Code is applicable to some of the information encompassed by section 552.022(a)(3).³ Therefore, we will address section 552.136, which also is other law that makes information confidential for purposes of section 552.022(a)(3). We also will address your claims under sections 552.107(1) and 552.108 for the information that is not encompassed by section 552.022(a)(3) and (16).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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

³Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(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 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. 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim the attorney-client privilege for communications between representatives of and attorneys for the city. You have generally identified the parties to the communications. Based on your representations and our review of the information at issue, we have marked information in the attorney fee bills the city may withhold under Texas Rule of Evidence 503. As the city has not demonstrated the attorney-client privilege is applicable to any of the remaining information in the attorney fee bills, none of the remaining information may be withheld under rule 503.

Section 552.136 of the Government Code provides in part that “[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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The city must withhold the bank account and bank routing numbers we have marked under section 552.136 in the information encompassed by section 552.022(a)(3).

Next, we address your claims under sections 552.107(1) and 552.108 of the Government Code for the information not encompassed by section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. 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. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the

client governmental body. See TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. See *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 claim section 552.107(1) for the remaining information labeled “Attorney/Client Documents.” You state the information at issue consists of communications between attorneys for and representatives of the city that were made for the purpose of facilitating the rendition of professional legal services to the city. You have identified most of the parties to the communications. You state the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we conclude the city may withhold most of the remaining information in the “Attorney/Client Documents” under section 552.107(1) of the Government Code. You have not demonstrated, however, that all of the parties to some of the remaining communications at issue are attorneys for or representatives of the city. We therefore conclude those communications, which we have marked, may not be withheld under section 552.107(1). We also note some of the e-mail strings at issue contain e-mails involving non-privileged parties. To the extent the e-mails involving non-privileged parties, which we also have marked, exist separate and apart from the e-mail strings in which they appear, the marked e-mails may not be withheld under section 552.107(1).

Section 552.108 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). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). 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 demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. You claim section 552.108(a)(1) for the remaining information labeled “Sheriff/DA Investigation” You have provided a copy of a letter from an assistant district attorney for Collin County who states the information at issue is related to a pending criminal investigation. She also states release of the information could jeopardize the investigation. Based on the assistant district attorney’s letter, we conclude the city may withhold the remaining information labeled “Sheriff/DA Investigation” under section 552.108(a)(1) of the Government Code.

Lastly, we note section 552.137 of the Government Code is applicable to some of the information that either is or may not be protected by section 552.107(1).⁴ Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov’t Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses the city must withhold under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the city may withhold the information we have marked in the attorney fee bills under Texas Rule of Evidence 503; (2) the city must withhold the bank account and bank routing numbers we have marked under section 552.136 of the Government Code; (3) the city may generally withhold the remaining information labeled “Attorney/Client Documents” under section 552.107(1), but may not withhold the marked communications that involve non-privileged parties or the marked non-privileged e-mails in e-mail strings to the extent they exist separate and apart from the e-mail strings; (4) the city may withhold the remaining information labeled “Sheriff/DA Investigation” under section 552.108(a)(1) of the Government Code; and (5) the city must withhold the e-mail addresses we have marked

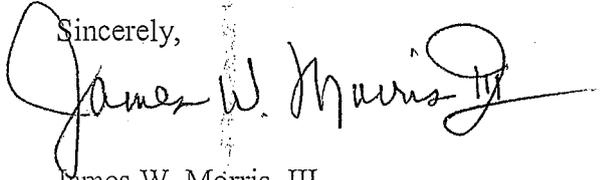
⁴Section 552.137 also is a mandatory exception that may not be waived. Gov’t Code §§ 552.007, .352; ORD 674 at 3 n.4.

under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The marked ordinance and resolution, the remaining marked information encompassed by section 552.022(a)(3) and (16), and any information not protected by section 552.107(1) must be released to the requestors, to the extent it is responsive to their respective requests.⁵

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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 403138

Enc: Submitted documents

c: Requestors
(w/o enclosures)

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including a bank account number and a bank routing number under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code.