



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2011

Ms. Jenny Gravley
Taylor Olson Adkins Sralla Elam, L.L.P.
For City of Richland Hills
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2011-16129

Dear Ms. Gravley:

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# 435046.

The City of Richland Hills (the "city"), which you represent, received a request for all information related to a specified address from January 1, 2009, to July 19, 2011, including all documents, e-mails, and records among and between a named individual, any code officer, the city manager, the mayor, and the city council. You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note the requestor has excluded social security numbers, driver's license numbers, and any personal addresses for city employees or officers from his request. Therefore, those types of information are not responsive to the present request for information. We also note you have marked portions of the submitted information as non-responsive to the present request because this information is not within the time frame specified by the requestor. We have marked additional non-responsive information. This ruling does not address the public availability of non-responsive information, and the city need not release such information.

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Next, we note portions of the submitted information, which we have marked, are subject to section 552.022 of the Government Code. Section 552.022 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, portions of the submitted information consist of invoices, which we have marked, pertaining to the expenditure of public funds by the city. The city may withhold information subject to section 552.022(a)(3) only if it is made confidential under "other law." Although you raise section 552.107 for this information, this section is a discretionary exception that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 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). As such, section 552.107 is not other law that makes information confidential for purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, 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). Accordingly, we will consider the applicability of the attorney-client privilege under Texas Rule of Evidence 503 for this information. We will also address your argument under section 552.107 for the information not subject to section 552.022.

Texas Rule of Evidence 503 enacts 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 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, the marked invoices, which are subject to section 552.022(a)(3) of the Government Code, are attached to an e-mail you claim is a privileged attorney-client communication. You state this communication was between the city and its legal counsel and was made for the purpose of providing professional legal services to the city. You also state the communication was intended to be and, has remained, confidential. Based on your representations and our review, we agree the marked invoices are contained within an attorney-client communication that is privileged under Rule 503. Therefore, the city may generally withhold this information under Rule 503. However, to the extent the marked invoices exist separate and apart from the privileged communication, the city may not withhold this information under Rule 503 of the Texas Rules of Evidence. As you claim no further exceptions for this information, to the extent the marked invoices exist separate and apart from the privileged communication, the city must release them.

Next, we consider your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Rule 503. 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 state the e-mails you have marked constitute confidential attorney-client communications between the city and its legal counsel that were made for the purpose of providing professional legal services to the city. You also state the communications were intended to be and, have remained, confidential. Based on your representations and our

review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the remaining e-mails you have marked under section 552.107 of the Government Code. We note, however, one of the privileged communications includes an attachment, which we have marked, that is with a non-privileged party. If this marked attachment exists separate and apart from the otherwise privileged communication, then the city may not withhold this marked information under section 552.107 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 117.(a)). Additionally section 552.117 encompasses personal cellular telephone and home facsimile numbers, provided the cellular and facsimile service is paid for by the employee with his or her personal funds. *See* Open Records Decision No. 506 at 5-7 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Therefore, to the extent the city official whose cellular telephone and home facsimile numbers are at issue timely requested confidentiality under section 552.024 and the cellular and facsimile service is paid for with personal funds, the city must withhold the marked cellular telephone and home facsimile numbers under section 552.117(a)(1) of the Government Code. To the extent the city official did not timely request confidentiality under section 552.024 or the service is not paid for with personal funds, then the city may not withhold the marked cellular telephone and home facsimile numbers under section 552.117(a)(1).

You have redacted personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). We note section 552.137 is not

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

applicable to an e-mail address of a person who has a contractual relationship with a governmental body. *See id.* § 552.137(c)(1). We have marked an additional e-mail address that must be withheld under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release under section 552.137(b).

In summary, to the extent the marked invoices do not exist separate and apart from the privileged communication, the city may withhold this information under Rule 503 of the Texas Rules of Evidence. The city may withhold the e-mails you have marked under section 552.107 of the Government Code. However, to the extent the non-privileged attachment, which we have marked, exists separate and apart from the otherwise privileged communication, the city must release it. To the extent the city official timely requested confidentiality under section 552.024 and the cellular and facsimile service is paid for with personal funds, the city must withhold the cellular telephone and home facsimile numbers we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release under section 552.137(b). 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.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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 435046

Enc. Submitted documents

c: Requestor
(w/o enclosures)