



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-18715A

Dear Ms. Evans:

This office issued Open Records Letter No. 2011-18715 (2011) on December 20, 2011. We have examined this ruling and determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on December 20, 2011. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 449416 (GC No. 18997).

The City of Houston (the "city") received a request for any and all information pertaining to investigations of a named individual for a specified time period. You claim the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

Initially, we note the information in Exhibit 3 and a portion of the information in Exhibit 2c consists of an investigation completed by the city's Office of the Inspector General (the "OIG") and is, therefore, subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is made confidential under this chapter or "other law" or is excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). Although you claim these records are subject to section 552.107(1) of the Government Code, that section is discretionary and does not make information confidential under the Act. *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). Accordingly, the information subject to section 552.022 may not be withheld under section 552.107(1). However, the attorney-client privilege found in Texas Rule of Evidence 503 is "other law" for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of Texas Rule of Evidence 503 to information encompassed by section 552.022). Therefore, we will consider your attorney-client privilege argument under Texas Rule of Evidence 503 for the information subject to section 552.022. In addition, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will also address your argument under this exception.

Rule 503 of the Texas Rules of Evidence 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
- (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). 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.

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).

You state, and provide documentation showing, that pursuant to City of Houston Executive Order 1-39 (Revised), the OIG is a division of the Office of the City Attorney and acts under that office’s supervision. You also state the information at issue consists of communications to and from employees of the OIG in their capacity as attorney representatives and various city employees in their capacity as clients and client representatives made in furtherance of the rendition of professional legal services to the city. You claim these communications were not intended for release to third parties, and the confidentiality of the communications has been maintained. Therefore, based on your representations and our review, we conclude the city may withhold the information in Exhibit 3 and the portion of information we have indicated in Exhibit 2c under rule 503 of the Texas Rules of Evidence.²

Next, we will address your arguments against disclosure of the remaining information not subject to section 552.022 of the Government Code. First, we address section 552.107 of the Government Code, as it is potentially the most encompassing exception you claim. 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).

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state the information in Exhibits 2, 2a, and 3a, as well as the remaining information in Exhibit 2c, consists of communications to and from employees of the OIG in their capacity as attorney representatives and various city employees in their capacity as clients and client representatives made in furtherance of the rendition of professional legal services to the city. You have identified the parties at issue. You claim these communications were not intended for release to third parties, and the confidentiality of the communications has been maintained. Upon review, we find the city may withhold the information at issue under section 552.107 of the Government Code.³

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as chapter 560 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). Upon review, we have marked fingerprints in Exhibit 2b. You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the submitted fingerprint information in this instance. Therefore, the city must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.⁴

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.”⁵ *Id.* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Upon review of the remaining information, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁴This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

⁵The 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).

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. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals whose information is at issue in the remaining information timely requested confidentiality under section 552.024, the city must withhold their information, which we have marked, under section 552.117(a)(1). Conversely, if any of the individuals did not make a timely election under section 552.024, the city may not withhold their information under section 552.117(a)(1).

Section 552.130 of the Government Code excepts from disclosure “information [that] relates to (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or another state or country; [or] (2) a motor vehicle title or registration issued by an agency of this state or another state or country[.]” Gov’t Code § 552.130(a)(1)-(2). Upon review, we find the city must withhold the motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

In summary, the city may withhold the information subject to section 552.022(a)(1) of the Government Code in Exhibit 3 and the portion of information we have indicated in Exhibit 2c under rule 503 of the Texas Rules of Evidence. The city may withhold the information in Exhibits 2, 2a, and 3a, as well as the remaining information in Exhibit 2c, under section 552.107 of the Government Code. The city must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The city must withhold the information we have marked under section 552.102 of the Government Code. If the individuals whose information is at issue in the remaining information timely requested confidentiality under section 552.024 of the Government Code, the city must withhold their information, which we have marked, under section 552.117(a)(1). The city must withhold the motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code. The city 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 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 449416

Enc. Submitted documents

c: Requestor
(w/o enclosures)