



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2012

Ms. Paige H. Saenz
Counsel for City of Bartlett
McKamie Krueger, L.L.P.
223 West Anderson Lane, Suite A105
Austin, Texas 78752

OR2012-20729

Dear Ms. Saenz:

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# 474750.

The City of Bartlett (the "city"), which you represent, received a request for twenty-eight categories of information relating to audits, several named individuals, six applicants for a specified position, and recordings. You state the city has released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, you state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-09846 (2012), 2012-12803 (2012), 2012-16204 (2012), and 2012-17494 (2012). We have no indication that the law, facts, or circumstances on which these prior rulings were based have changed. Accordingly, we conclude the city must continue to rely on these rulings as previous determinations and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2012-09846, 2012-12803, 2012-16204, and 2012-17494. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against the release of the submitted information not encompassed by Open Records Letter Nos. 2012-09846, 2012-12803, 2012-16204, and 2012-17494.

Next, we note some of the submitted information consists of completed audit reports created for the city. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). The reports we marked in Exhibits D and E are subject to section 552.022(a)(1) and must be released unless they are either excepted under section 552.108 of the Government Code or are confidential under the Act or other law. You do not claim section 552.108 for these reports. Although you assert this information is excepted from disclosure under sections 552.107, 552.111, and 552.116 of the Government Code, these sections are discretionary and do 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), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022 under section 552.107, section 552.111, or section 552.116. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503.

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
- (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. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You explain the information subject to section 552.022 in Exhibits D and E consists of communications made between attorneys for the city and a third party auditor hired by the city's attorneys in order for the city's attorneys to provide legal advice to the city. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city and have remained confidential. Based on your representations and

our review, we conclude the information in Exhibits D and E we have marked that is subject to section 552.022 may be withheld under Texas Rule of Evidence 503.

You claim section 552.107(1) of the Government Code for Exhibit C and the information in Exhibit D that is not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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. 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*, 922 S.W.2d at 923.

You state the information at issue in Exhibits C and D constitutes communications between attorneys for the city, a third party auditor, and city representatives that were made for the purpose of providing legal services to the city. As previously discussed, you explain the third party auditor was hired by the city's attorneys and communicated with the city's attorneys in order for the city's attorneys to provide legal advice to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information in Exhibit C and the information in Exhibit D that is not subject to section 552.022 consists of privileged attorney-client communications that the city may generally withhold under section 552.107(1) of the Government Code.² We note, however, some of the e-mail strings in Exhibit C include e-mails received from or sent to individuals you have not demonstrated are privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, to the extent these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

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 section 182.052 of the Utilities Code, which provides, in part:

- (a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer

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

requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.

(b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

(c) A government-operated utility shall include with a bill sent to each customer:

...

(3) a form by which the customer may request confidentiality by marking an appropriate box on the form and returning it to the government-operated utility.

Util. Code § 182.052(a)-(b), (c)(3). Water and electricity services are included in the scope of utility services covered by section 182.052. *Id.* § 182.051(3). "Personal information" under section 182.052(a) includes an individual's address, telephone number, or social security number, but does not include the individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). However, we note a post office box number is not an address for the purposes of section 182.052. A customer's request for confidentiality must precede the utility's receipt of the request for information. ORD 625 at 6.

The information in Exhibit B consists of water and electric utility records of a residential customer. Section 182.052(b) provides the means by which a customer may request confidentiality for his or her personal information, certain utility usage information, and information relating to the amounts billed to or collected from the customer for utility usage. *See* Util. Code § 182.052(a), (b). The submitted information includes a copy of the city's election form and demonstrates the customer whose information is at issue requested confidentiality of her personal information. However, upon review we find the city's election form permits a customer to request confidentiality for only the customer's "personal information," and it does not provide a means for a customer to request confidentiality for his or her usage or billing information. Accordingly, the city may not withhold any of the customer's usage and billing information on this basis. *See* Open Records Decision No. 478 at 2 (1987) (language of confidentiality statute controls scope of protection). Additionally, the submitted election form does not indicate whether the confidentiality election was made prior to the date the city received the request for information. As such, we rule conditionally. If the customer whose information is at issue did not request confidentiality of her personal

information before the city received the present request for information, the city may not withhold any of the information in Exhibit B under section 552.101 of the Government Code on this basis. If the customer whose information is at issue requested confidentiality of her personal information before the city received the present request for information, the city must withhold the personal information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. None of the remaining information in Exhibit B constitutes personal information for the purposes of section 182.052; thus, the city may not withhold any of the remaining information under section 552.101 on this basis.

Section 552.108(a) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Your state Exhibit F pertains to a pending criminal investigation with the city’s police department. Based upon your representation and our review, we conclude that release of Exhibit F 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to Exhibit F.

As you acknowledge, however, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). Thus, with the exception of the basic front page offense and arrest information, the city may withhold Exhibit F under section 552.108(a)(1) of the Government Code.

To the extent the non-privileged e-mails in Exhibit C exist separate and apart from the otherwise privileged e-mail strings, we note some of the information at issue may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the current and former 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 this information be kept

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).

confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). We further note section 552.117 also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether 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). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 and if the cellular service at issue is not paid for by a governmental body, the city must withhold the information we have marked in Exhibit C under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the marked cellular telephone service, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

We note portions of the remaining information in Exhibit B are subject to section 552.136 of the Government Code. Section 552.136 states, "Notwithstanding any other provision of this chapter, 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 also id.* § 552.136(a) (defining "access device"). Upon review, we find the city must withhold the account numbers we have marked in Exhibit B under section 552.136 of the Government Code.

To the extent the non-privileged e-mails in Exhibit C exist separate and apart from the otherwise privileged e-mail strings, we note some of the information at issue may also be subject to section 552.137 of the Government Code. Section 552.137 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail

addresses we have marked in Exhibit C under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.⁴

In summary, the city must continue to rely on Open Records Letter Nos. 2012-09846, 2012-12803, 2012-16204, and 2012-17494 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. The city may withhold the information we have marked in Exhibits D and E that is subject to section 552.022 of the Government Code under Texas Rule of Evidence 503. The city may withhold the information in Exhibit C and the information in Exhibit D that is not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code, to the extent the non-privileged e-mails we have marked in Exhibit C are not maintained separate and apart from the otherwise privileged e-mail strings in which they appear. To the extent the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. If the customer whose information is at issue requested confidentiality of her personal information before the city received the present request for information, the city must withhold the personal information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. With the exception of the basic front page offense and arrest information, which must be released, the city may withhold Exhibit F under section 552.108(a)(1) of the Government Code. If the individual whose information is at issue timely requested confidentiality under section 552.024 and if the cellular service at issue is not paid for by a governmental body, the city must withhold the information we have marked in Exhibit C under section 552.117(a)(1) of the Government Code. The city must withhold the account numbers we have marked in Exhibit B under section 552.136 of the Government Code. The city must withhold the e-mail addresses we have marked in Exhibit C under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The city must release the remaining information.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.

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain 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.

⁵We note the remaining information contains a social security number of an arrested person. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large, looped initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 474750

Enc. Submitted documents

c: Requestor
(w/o enclosures)