



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 16, 2013

Mr. Stephen A. Cumbie
Assistant City Attorney
Office of the City Attorney
City of Fort Worth
1000 Throckmorton Street, 3RD Floor
Fort Worth, Texas 76102

OR2013-00980

Dear Mr. Cumbie:

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# 476317 (CFW Public Information Request Nos. W021113, W01114, and W021731).

The City of Fort Worth (the "city") received two requests from the same requestor for specified information pertaining to two specified complaints and a third request from a second requestor for a specified completed report concerning one of these complaints. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the second requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹Although we understand you to raise the attorney work product privilege, you make no arguments concerning this exception as required by section 552.301. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address the work product privilege. In addition, although you do not raise sections 552.117 and 552.136 of the Government Code, we understand you to claim these sections based on your markings in the submitted information.

Initially, we note the second requestor informs us the specified completed report he seeks was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-07075 (2012). We also note portions of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-20418 (2012). In Open Records Letter No. 2012-07075, we determined the city may withhold the information at issue under Texas Rule of Evidence 503. In Open Records Letter No. 2012-20418, we ruled the city may withhold the information at issue under section 552.103 of the Government Code. We are unaware of any change in the relevant law, facts, and circumstances on which the previous rulings were based. Accordingly, the city may rely on Open Records Letter No. 2012-07075 as a previous determination and withhold the information we have marked in accordance with this ruling.² Further, to the extent the remaining information is identical to the information submitted in Open Records Letter No. 2012-20418, we conclude the city may rely on this ruling as a previous determination and withhold such information in accordance with it. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). To the extent the remaining information is not encompassed by Open Records Letter No. 2012-20418, we will consider your arguments against disclosure.

Next, we note portions of the remaining information are subject to section 552.022 of the Government Code, which provides in pertinent 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 unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

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

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1) (3), (18). We have marked employee evaluations subject to section 552.022(a)(1); information in an account, voucher, or contract relating to the expenditure of public funds subject to section 552.022(a)(3); and a settlement agreement subject to section 552.022(a)(18). Although you raise sections 552.103, 552.107, and 552.111 of the Government Code for this information, we note these sections are discretionary exceptions that protect a governmental body's interests and do not make information confidential under the Act. *See 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); *see also* 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), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the city may not withhold the information subject to section 552.022 of the Government Code under sections 552.103, 552.107, or 552.111 of the Government Code. As you raise no further exceptions to disclosure of the information subject to section 552.022(a)(18), the city must release it. 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 your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the remaining information subject to section 552.022(a)(1). Further, because sections 552.101, 552.117, and 552.136 of the Government Code can make information confidential under the Act, we will address the applicability of these sections to the remaining information subject to section 552.022(a)(3).

We first address the remaining information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). See Open Records Decision No. 551 at 4 (1990).

You inform us, and provide documentation showing, the city received the requests for information after a lawsuit styled *Marshall v. City of Fort Worth, Texas*, No. CV12-09-610, was filed in the 271st Judicial District Court of Wise County. Thus, we find litigation involving the city was pending when it received the requests. You also inform us the information at issue relates to the lawsuit. Based on your representations and our review, we agree this information is related to the pending litigation for purposes of section 552.103. Accordingly, we conclude the city may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.³

However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Therefore, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address the remaining information subject to section 552.022 of the Government Code. Texas Rule of Evidence 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:

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

(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 claim the employee evaluations subject to section 552.022(a)(1) consist of communications between city attorneys and city employees and officers that were made for the purpose of facilitating the rendition of professional legal services to the city. You also inform us these communications were intended to be and have remained confidential. Upon review, however, we find you have failed to demonstrate how the information at issue constitutes communications made for the purpose of facilitating the rendition of professional

legal services to the city. Therefore, we find you have failed to establish the applicability of the attorney-client privilege to this information. Consequently, the city may not withhold the employee evaluations subject to section 552.022(a)(1) of the Government Code under Texas Rule of Evidence 503. As you raise no further exceptions to disclosure of this information, the city must release it.

You raise section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.117 and 552.136 of the Government Code for the information subject to section 552.022(a)(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 common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. We some of the information at issue consists of a former city employee's financial information. This office has found there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Record Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 423 at 2 (1984) (scope of public employee privacy is narrow). Although most of the financial information at issue pertains to financial transactions between the former employee and the city, this office has determined that a public employee's net pay is protected by common-law privacy. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (stating net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about given individual that is not of legitimate concern to public). This office has also found a public employee's allocation of part of the employee's salary to a voluntary investment, health or other program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (deferred compensation information, participation in voluntary investment program, and election of optional insurance coverage). Upon review, we find the financial information you and we have marked in the information subject to section 552.022(a)(3) of the Government Code is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). 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 the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. Thus, to the extent the former city employee at issue timely requested confidentiality for her information under section 552.024 of the Government Code, the city must withhold the information you and we have marked in the remaining information subject to section 552.022(a)(3) of the Government Code under section 552.117(a)(1) of the Government Code.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding 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"). Accordingly, the city must withhold the bank account and routing numbers you have marked in the remaining information subject to section 552.022(a)(3) of the Government Code under section 552.136 of the Government Code.

In summary, the city may rely on Open Records Letter No. 2012-07075 as a previous determination and withhold the information we have marked in accordance with this ruling. To the extent the remaining information is identical to the information submitted in Open Records Letter No. 2012-20418, the city may rely on that ruling as a previous determination and withhold such information in accordance with it. The city may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. With regard to the information we have marked under section 552.022 of the Government Code, the city must withhold (1) the marked financial information under section 552.101 of the Government Code in conjunction with common-law privacy, (2) the marked information under section 552.117(a)(1) of the Government Code to the extent the former city employee at issue timely requested confidentiality for her information under section 552.024 of the Government Code, and (3) the bank account and routing numbers you have marked under section 552.136 of the Government Code. The city must release the remaining information we have marked under section 552.022 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 476317

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)