



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2013

Mr. Mark G. Daniel
Attorney for the City of Watauga
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115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2013-09683

Dear Mr. Daniel:

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# 489717 (ORR # 13-70).

The City of Watauga (the "city"), which you represent, received a request for a specified CD/DVD containing information on a named individual. You state the city is releasing some of the requested information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, you state Exhibits B through E may have already been released to the public. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Whether the information at issue was previously released to the public is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decisions Nos. 554 (1990), 552 (1990). Therefore, we must rule conditionally. Although you raise section 552.107 of the Government Code for a portion of this information, section 552.107 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary

exceptions generally). Thus, to the extent the city has previously released any of the information at issue, the city has waived its claims under section 552.107 and may not withhold it on that basis. However, to the extent the information at issue has not been previously released, we will address the city's claim under section 552.107 of the Government Code. You also seek to withhold portions of the information at issue under sections 552.101, 552.117 and 552.136 of the Government Code. Because these sections make information confidential by law, we will consider the applicability of these sections to the information at issue, as well.

Next, you inform us Exhibit E was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-09578 (2013). In Open Records Letter No. 2013-09578, we determined that the city must (1) withhold a portion of the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) withhold the information we marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (3) withhold a portion of the submitted information under section 552.107(1) of the Government Code; (4) withhold the information it had marked under section 552.136 of the Government Code; and (5) release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, we conclude the city may rely on Open Records Letter No. 2013-09578 as a previous determination and withhold or release the identical requested information in accordance with that ruling. *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). We will address your arguments against disclosure of the submitted information, which was not the subject of the previous ruling.

Next, we note that the submitted information includes the city's charter. The charter is a matter of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Thus, the submitted charter, which we have marked, must be released.

Next, we note portions of the submitted information are subject to section 552.022(a) of the Government Code, which provides in part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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, the submitted information includes checks and signed purchase orders relating to the expenditure of public funds by the city, which are subject to section 552.022(a)(3), and information in attorney fee bills, which is subject to section 552.022(a)(16). Thus, the city must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless the information is confidential under the Act or other law. *Id.* Although you raise section 552.107 of the Government Code for this information, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* ORDs 676 and 665. Therefore, the city may not withhold the information subject to section 552.022 under this section. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. Furthermore, because sections 552.101, 552.117, and 552.136 of the Government Code make information confidential under the Act, we will address the applicability of these sections. We will also address your arguments for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) 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 it is 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. 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 communication 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 attaches to complete communication, including factual information).

You explain the checks and purchase orders subject to section 552.022(a)(3) contained in Exhibit C are attachments to a memorandum contained in Exhibit B. You explain Exhibit B was communicated by the City Attorney to the city at the request of a city council member for the purpose of facilitating the rendition of professional legal services to the city. You further state the information contained in Exhibit C consist of a communication by a law firm to the city of the firm’s file relating to its representation of the city on matters of city business. You state this communication was made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential 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 attached checks and purchase orders in Exhibit C. Accordingly, the city may withhold this information under Texas Rule of Evidence 503.

We understand you to claim the submitted attorney fee bills are confidential in their entirety under rule 503. However, as noted above, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See*

also Open Records Decision Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Thus, under rule 503, the city may withhold only the parts of the attorney fee bills that you specifically demonstrate consist of privileged communications.

You assert the submitted attorney fee bills contain confidential communications between the city and the city's attorneys. You state these communications were made in order to facilitate the rendition of legal services to the city. Based on your representations and our review, we find the city may withhold the information we have marked under Texas Rule of Evidence 503. We note, however, the remaining information does not document an actual communication. Accordingly, we conclude rule 503 is not applicable to the remaining information and it may not be withheld on this basis.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information you have highlighted in blue, and the additional information we have marked, is highly intimate or embarrassing and not of legitimate public concern.

Therefore, the city must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

You claim the information in Exhibits B and C that is not subject to section 552.022 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

As noted above, you explain Exhibit B consists of a communication by the City Attorney to the city at the request of a city council member, and Exhibit C consists of a communication to the city by a law firm representing the city. You inform us these communications were intended to be confidential and the confidentiality has been maintained. Based on these representations and our review, we agree section 552.107(1) is applicable to the information at issue, and the city may withhold Exhibit B and the information in Exhibit C not subject to section 552.022 under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117, .024. 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). 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 the information. You inform us the employees at issue timely elected confidentiality under section 552.024. Therefore, the city must withhold the information you have marked under section 552.117(a)(1) of the Government Code.

Section 552.136(b) of the Government Code states "[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"). Upon review, we find the city

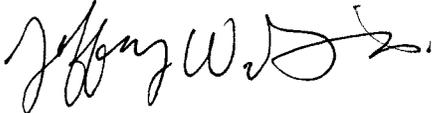
must withhold the information you have highlighted in green, and the additional information we have marked, under section 552.136 of the Government Code.¹

In summary, the city may rely on Open Records Letter No. 2013-09578 as a previous determination and withhold or release the identical requested information in accordance with that ruling. The city must release the marked copy of the city charter. The city may withhold the checks and purchase orders in Exhibit C and the information we have marked in the attorney fee bills under Texas Rule of Evidence 503. The city must withhold the information you have highlighted in blue, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information not subject to section 552.022 of the Government Code in Exhibits B and C under section 552.107(1) of the Government Code. The city must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The city must withhold the information you have highlighted in green, and the additional information we have marked, under section 552.136 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

¹We note section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. See Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). See *id.* § 552.136(d), (e).

Ref: ID# 489717

Enc. Submitted documents

c: Requestor
(w/o enclosures)