



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2014

Ms. Lisa M. Tatum
LM Tatum, P.L.L.C.
111 Soledad, Suite 358
San Antonio, Texas 78205

OR2014-05299

Dear Ms. Tatum:

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# 518404.

The South Central Texas Regional Certification Agency (the "agency"), which you represent, received a request for eleven categories of information pertaining to agency meetings during a specified time period; two named agency employees, including resolutions concerning administrative leave and reinstatement of one of the named employees; specified investigations regarding recording conversations' budgets and budget forecasts for specified years; and specified statistical reports for a specified time period. You state the agency is releasing some of the requested information.¹ You contend some of the submitted information is not subject to the Act. You claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111,

¹We understand the information released consists of the requested agendas, minutes, reports, and recordings of open meetings, as well as budgets, budget forecasts, and statistical reports, for which you do not claim an exception to disclosure. See Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting); *id.* §§ 552.022(a)(3) (information relating to receipt or expenditure of public or other funds by governmental body not excepted from required disclosure unless confidential under the Act or other law), .022(a)(5) (information used to estimate need for or expenditure of public funds or taxes by governmental body, on completion of estimate, not excepted from required disclosure unless confidential under the Act or other law).

and 552.117 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we address your argument that some of the requested information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

(a) . . . information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or

²We assume the "representative sample" of records 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 that submitted to this office.

maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

In this instance, you argue the requested audio recordings of conversations between the two named agency employees, and the submitted transcripts of such recordings, do not constitute public information subject to the Act. You state the recordings at issue were made "as a result of the employees' autonomous decision for their own private reasons." You contend "the content of the information is irrelevant to the determination of whether the information is collected, assembled, or maintained by a governmental body." We disagree. The submitted documentation reveals the audio recording at issue was submitted to the agency by agency staff in connection with an investigation of a complaint alleged against one of the named employees. Moreover, you state the transcript of the conversation, which you have submitted as Exhibit C, was created by the agency in the course of conducting the investigation. We further note the content of the conversation at issue relates to official agency business. Upon review, we find the information at issue is maintained by the agency in connection with the transaction of its official business. Thus, we find the transcript of a conversation between the two named employees submitted as Exhibit C, and any associated audio recording, are subject to the Act and must be released unless they are otherwise excepted from disclosure. *See id.* §§ 552.003, .021, .301, .302.

Next, we note Exhibit G is not responsive to the instant request for information because it does not pertain to any of the eleven requested categories of information. This ruling does not address the public availability of any information that is not responsive to the request and the agency is not required to release such information in response to this request.

Next, we note the agency did not fully comply with section 552.301 of the Government Code. Section 552.301(b) requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). While the agency raised sections 552.101, 552.102, 552.107, 552.111, and 552.117 within the ten-business-day time period as required by subsection 552.301(b), the agency did not raise section 552.103 until after the ten-business-day deadline had passed. Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Section 552.103 is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the responsive information may be withheld under section 552.103 of the Government Code. We will consider the agency's timely-raised exceptions to disclosure for the submitted information.

Next, we note the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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:

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

Id. § 552.022(a)(1). The responsive information is part of a completed investigation and is subject to subsection 552.022(a)(1). The agency must release such information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to subsection 552.022(a)(1) under sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the responsive information may not be withheld under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. Further, as section 552.101 of the Government Code applies to confidential information and as sections 552.102 and 552.117 of the Government Code make information confidential under the Act, we will consider your arguments under these exceptions for the information at issue.

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 exception encompasses information other statutes make confidential. You raise section 552.101 in conjunction with section 551.104 of the Open Meetings Act for

the certified agendas and audio recordings of closed meetings. Section 551.104 provides, in part, “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov’t Code § 552.101). You state the requested information includes certified agendas and audio recordings of closed meetings. Based on your representation, we agree the agency must withhold certified agendas and audio recordings of closed meetings under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.³

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

³We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including a certified agenda and tape of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684 at 6, 14.

(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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (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. 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the responsive information should be withheld under rule 503 of the Texas Rules of Evidence. You assert the information at issue consists of privileged attorney-client communications between an attorney for the agency, the attorney's legal staff, and agency officials and staff in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the agency. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the agency has established the responsive information constitutes attorney-client communications under rule 503. Thus, the agency may generally withhold the responsive information pursuant to rule 503 of the Texas Rules of Evidence.⁴

We note, however, one of the communications at issue includes an attached copy of a resolution, which is separately responsive to the request. As laws and ordinances are binding on members of the public, they are matters of public record. Therefore, if the attached resolution, which we have marked, is maintained by the agency separate and apart from the otherwise privileged communication in which it appears, then the agency may not withhold it under rule 503 of the Texas Rules of Evidence, and it must be released.

In summary, the agency must withhold certified agendas and audio recordings of closed meetings under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. The agency may withhold the submitted

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of the submitted information.

responsive information under rule 503 of the Texas Rule of Evidence; however, if the marked resolution is maintained by the agency separate and apart from the otherwise privileged communication to which it is attached, then the agency must release it.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 518404

Enc. Submitted documents

c: Requestor
(w/o enclosures)