



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 29, 2014

Ms. Tabitha Goodwin  
Cowles & Thompson  
901 Main Street, Suite 3900  
Dallas, Texas 75202

OR2014-19538

Dear Ms. Goodwin:

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# 541181.

The Town of Addison (the "town"), which you represent, received a request for police reports, citations, arrest reports, and adjudications pertaining to a named individual and all e-mails from the same individual's town e-mail account with members of the town's police department during a particular time period. The town received a second request from the same requestor for three categories of information related to a specified investigation. You state the town will release some of the requested information. You also state the town has no information responsive to portions of both requests.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

You inform this office some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-15593 (2014). In that ruling, we determined the town may withhold the submitted investigation report under rule 503 of the Texas Rules of Evidence. We have no indication

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Disciplinary Rule of Professional Conduct 1.05, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002), 575 at 2 (1990).

the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the town may continue to rely on Open Records Letter No. 2014-15593 as a previous determination and withhold the investigation report in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address the town's arguments against release of the submitted information that is not encompassed by Open Records Letter No. 2014-15593.

We note some of the remaining information is subject to section 552.022 of the Government Code. 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). You explain the submitted attorney notes are part of a completed investigation. As such, the notes are subject to section 552.022(a)(1) and must be released unless excepted under section 552.108 of the Government Code or confidential under the Act or other law. Although you assert the notes are excepted from disclosure under section 552.107(1) of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the town may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. 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 address your assertion of the attorney-client privilege for the information subject to section 552.022 under Texas Rule of Evidence 503. We will also consider your arguments under sections 552.103 and 552.107(1) of the Government Code for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

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).

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 inform us the information subject to section 552.022 consists of notes made by the town’s attorney as part of her investigation. You indicate the notes were created in furtherance of the rendition of professional legal services to the town. You argue the notes are privileged as part of the “ability of the client to dialogue with the client’s attorney [as] part of the ‘free discussion’ between client and lawyer[.]” You state the information at issue was not intended for release to third parties and the town has maintained the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information subject to section 552.022. Accordingly, the town may withhold the attorney notes, which are subject to section 552.022, under rule 503 of the Texas Rules of Evidence.

Next, we address your arguments for the information not subject to section 552.022. You assert the submitted e-mail is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) also 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 explain the remaining information consists of a communication made for the purpose of facilitating the rendition of professional legal services. You state the communication was between an attorney representing the town and the members of the town council, and the communication was to be kept confidential among the intended parties. Finally, you state the town has not waived its privilege with respect to the information at issue. Based on your representations and our review, we find the town has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the town may withhold the remaining information under section 552.107(1) of the Government Code.<sup>3</sup>

In summary, the town may continue to rely on Open Records Letter No. 2014-15593 as a previous determination and withhold the investigation report in accordance with that ruling. The town may withhold the attorney notes, which are subject to section 552.022 of the Government Code, under Texas Rule of Evidence 503 and the remaining information under section 552.107(1) 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Ref: ID# 541181

Enc. Submitted documents

c: Requestor  
(w/o enclosures)