



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2014

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2014-23050

Dear Ms. Grace:

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# 547323.

The City of Austin (the "city") received two requests from the same requestor for information redacted from records provided to the requestor by the city in response to a prior request for information.¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's claim the requested information is presumed to be public and subject to release under section 552.302 of the Government Code because the city failed

¹We note the prior request for information was received by the city on January 23, 2014.

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 that those records contain substantially different types of information than that submitted to this office.

to comply with the procedural requirements of the Act regarding a prior request for the same information the city received on January 23, 2014. *See id.* § 552.301 (setting forth ten- and fifteen-business-day deadlines for open records ruling requests); *see also id.* § 552.302 (requiring release of information, absent compelling reason to withhold it, if governmental body does not request ruling as provided by section 552.301).

The requestor acknowledges the city received clarification of the January 23 request from the requestor's attorney on February 10, 2014. *See id.* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). In her clarification, the requestor's attorney excluded from the request all responsive attorney-client privileged information, which is the information the requestor now seeks. The city then released the responsive information to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body determines no exceptions apply to requested information, it must release information as soon as possible).

Because the city did not seek to withhold any of the information responsive to the prior request pursuant to an exception under the Act, it was not required to seek a ruling from our office. *See id.* § 552.301(a) (governmental body that receives written request for information it wishes to withhold from public disclosure and that it considers to be excepted from disclosure under Act must ask for decision from attorney general about whether information is within exception). Thus, the procedural deadlines mandated by section 552.301 were inapplicable to the prior request and the presumption of openness for failure to comply with the Act's procedures did not come into play. Therefore, we will address the city's arguments against disclosure of the requested information.

We next note some of the submitted information is subject to section 552.022 of the Government Code, which provides in part the following:

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;

Gov't Code § 552.022(a)(1). Some of the submitted attachments consist of completed reports and evaluations subject to section 552.022(a)(1). Although you assert this information is excepted from release under section 552.107 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) (section 552.107 is not other law for purposes of section 552.022); *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. 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). Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 for these attachments. We also will consider your section 552.107 claim 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 state the information at issue was communicated between attorneys for the city and city employees for the purpose of facilitating the rendition of professional legal services to the city. You further state this information was intended to be and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to these attachments. Therefore, we conclude the city may withhold the information subject to section 552.022, which we have marked, under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 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).

You state the remaining information consists of communications between attorneys for the city and city employees made for the purpose of facilitating the rendition of professional legal services to the city. You further state these 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 information at issue. Thus, the city may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the city may withhold the information subject to section 552.022(a)(1) of the Government Code, which we have marked, under rule 503 of the Texas Rules of Evidence. The city may withhold 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, 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

Ref: ID# 547323

Enc. Submitted documents

c: Requestor
(w/o enclosures)