



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 4, 2016

Ms. Elaine Nicholson
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2016-02726

Dear Ms. Nicholson:

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# 597021.

The City of Austin (the "city") received a request for the billing records from Thompson & Knight, LLP, from a specified time period and the personnel files of two named individuals, including their time sheets and earning records for a specified time period. The city states it is withholding some of the requested information in accordance with Open Records Letter No. 2015-09517 (2015). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). The city claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception the city claims and reviewed the submitted representative sample of information.¹

Initially, we note the city has not submitted the personnel files of the two named individuals. We assume, to the extent any of this information existed on the date the city received the request, the city has released it. If the city has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No.

¹We 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.

664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-00394 (2016). In Open Records Letter No. 2016-00394, we determined the city (1) may continue to rely on Open Records Letter Nos. 2015-09383 (2015), 2015-11205 (2015), and 2015-20283 (2015) as previous determinations and withhold or release the identical information in accordance with those rulings; (2) may withhold certain information under Texas Rule of Evidence 503; and (3) may withhold the certain information under section 552.107 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the city may continue to rely on Open Records Letter No. 2016-00394 as a previous determination and withhold or release the submitted information 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 city's arguments against release of the submitted information that is not encompassed by Open Records Letter No. 2016-00394.

Additionally, we note the information at issue consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[,]" unless the information is confidential under the Act or other law. Gov't Code § 522.022(a)(16). Although the city raises section 552.107 of the Government Code for some of the attorney fee bills, this exception is discretionary in nature and does not make information confidential under the Act. *See* 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), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the information subject to section 552.022(a)(16) 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 purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the city's assertion of the attorney-client privilege under Texas Rule of Evidence 503.

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 to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *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).

The city asserts the information it has marked should be withheld under rule 503. The city states the attorney fee bills contain communications between the city and attorneys of the city that were made for the purpose of facilitating the rendition of professional legal services. The city does not indicate it has waived the attorney-client privilege with regard to the communications. Upon review, we find the city may withhold the information we have marked under Texas Rule of Evidence 503. However, we find the city has not demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Accordingly, the city may not withhold the remaining information at issue on that basis.

In summary, the city may continue to rely on Open Records Letter No. 2016-00394 as a previous determination and withhold or release the submitted information in accordance with that ruling. The city may withhold the information we have marked under Texas Rule of Evidence 503. 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 597021

Enc. Submitted documents

c: Requestor
(w/o enclosures)