



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

January 31, 2013

Ms. Lisa D. Mares  
Counsel for the City of Crowley  
Taylor Olson Adkins Sralla Elam, L.L.P.  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107

OR2013-01812

Dear Ms. Mares:

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# 477605.

The City of Crowley (the "city"), which you represent, received a request for personnel information related to the requestor's client and a specified internal affairs investigation. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.107(1) of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have only submitted information pertaining to the investigation specified in the request. To the extent information responsive to the remainder of the request existed on the date the city received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the submitted information consists of a completed internal affairs investigation. 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). The submitted

information is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. You raise section 552.108 for some of the submitted information; therefore, we will address your arguments under section 552.108 for this information. However, although you assert some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code, we note this section is discretionary 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). Therefore, the city may not withhold the information subject to section 552.022 under section 552.107(1) 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 consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for Exhibit D. Additionally, because section 552.101 of the Government Code can provide a compelling reason against disclosure, we will the applicability of this exception, as well as your claims under section 552.108 of the Government Code.

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
- (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).

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. Thus, 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. *Id.* 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 document 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 extends to entire communication, including factual information).

You state the information submitted in Exhibit D consists of confidential communications between the city attorney, city employees, and outside counsel for the city that were made in furtherance of professional legal services rendered to the city. You state these communications were intended to be and have remained confidential. Based on your representations and our review, we conclude the information in Exhibit D may generally be withheld under Texas Rule of Evidence 503. However, we note some of the information in Exhibit D consists of e-mail strings with a non-privileged party. Furthermore, if these communications were removed from the e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, to the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, the city may not withhold these communications, which we have marked, under rule 503 of the Texas Rules of Evidence. The city may withhold the remaining information in Exhibit D under rule 503.

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. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. 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.

Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* ORDs 393, 339; *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.— El Paso 1992, writ denied) (identity of witnesses to and victim of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information); ORD 440 (detailed descriptions of serious sexual offenses must be withheld). In this instance, the information in Exhibits B-1, B-2, and C pertains to an alleged sexual assault. Additionally, the submitted information demonstrates the requestor's client knows the identity of the alleged sexual assault victim. Thus, withholding only the victim's identifying information from this requestor would not preserve the victim's common-law right to privacy. Accordingly, to protect the victim's privacy, the city must withhold Exhibits B-1, B-2, and C in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>1</sup>

In summary, the city may withhold the information in Exhibit D under rule 503 of the Texas Rules, to the extent the non-privileged e-mails in Exhibit D we have marked do not exist separate and apart from the otherwise privileged e-mail strings in which they appear. To the extent the non-privileged e-mails we have marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under rule 503 of the Texas Rules of Evidence.<sup>2</sup> The city must withhold Exhibits B-1, B-2, and C in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.

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.

---

<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>2</sup>We note the information being released in that instance contains the requestor's e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). Should the city receive another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



**Vanessa Burgess**  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 477605

Enc. Submitted documents

c: Requestor  
(w/o enclosures)