



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-19958

Dear Ms. Folsom:

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# 505880 (GC No. 20805).

The Houston Fire Department (the "department") received a request for three specified complaints filed against the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note a portion of the information in Exhibit 3, which we have marked, consists of a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in relevant 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). Although you assert this information is excepted from disclosure 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 Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, pursuant to section 552.022(a)(1), the department may not withhold the portion of Exhibit 3 we have marked 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). Therefore, we will consider your assertion of the attorney-client privilege for this information under rule 503 of the Texas Rules of Evidence. In addition, we will address your arguments for the information not subject to section 552.022.

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
- (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 inform us Exhibit 3 consists of communications to and from employees of the Office of the Inspector General (the “OIG”) for the City of Houston (the “city”) in their capacity as attorney representatives and city employees in their capacities as clients and client representatives. You state the OIG is a division of the city attorney’s office and acts under the city attorney’s supervision. You state the communications in Exhibit 3 were made to facilitate the rendition of professional legal services to the city. You also assert the communications in Exhibit 3 were intended to be confidential and that confidentiality has been maintained. Having considered your representations and reviewed the information at issue, we find you have established the information subject to section 552.022 in Exhibit 3 constitutes privileged attorney-client communications. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the department may withhold this information under Texas Rule of Evidence 503.

You claim section 552.107 of the Government Code for the remaining information in Exhibit 3. 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 above 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).

As noted above, you state the information in Exhibit 3 consists of communications to and from employees of the OIG in their capacity as attorney representatives and city employees in their capacities as clients and client representatives. You state these communications were made to facilitate the rendition of professional legal services to the city. You also assert these communications were intended to be confidential and that confidentiality has been maintained. Having considered your representations and reviewed the information at issue, we find you have demonstrated the attorney-client privilege for most of the remaining information in Exhibit 3. Accordingly, the department may generally withhold this information under section 552.107 of the Government Code. However, we note a portion

of the remaining information in Exhibit 3 consists of a letter sent to the requestor who, as the subject of the investigation at issue, is a non-privileged party. Accordingly, we find the department has failed to demonstrate the applicability of the attorney-client privilege to this information, which we have marked for release, and may not withhold this information under section 552.107. With the exception of the information we have marked for release, the department may withhold the remaining information in Exhibit 3 under section 552.107 of the Government Code.

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 section 143.1214 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 provides in relevant part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You inform us the information you have marked Exhibit 2 relates to an internal affairs investigation conducted by the department regarding

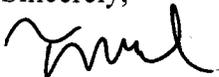
alleged misconduct by a department firefighter. You state the allegations were not sustained and no disciplinary action was taken. The requestor is not an employee of another law enforcement agency or fire department or a district or United States attorney's office. You assert the information at issue does not meet the requirements of section 143.1214(c) for inclusion in the fire fighters' civil service personnel files. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). Thus, based on your representations and our review, we conclude Exhibit 2 must be withheld under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code.

In summary, the department may withhold the information we have marked in Exhibit 3 under Texas Rule of Evidence 503. With the exception of the information we have marked for release, the department may withhold the remaining information in Exhibit 3 under section 552.107 of the Government Code. The department must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. The remaining information must be released.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/som

Ref: ID# 505880

Enc. Submitted documents

c: Requestor
(w/o enclosures)