



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2014

Ms. Janis K. Hampton
Bryan City Attorney
P.O. Box 1000
Bryan, Texas 77805-1000

OR2014-05598

Dear Ms. Hampton:

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# 518888.

The City of Bryan (the "city") received two requests from the same requestor for: (1) daily pre-trial docket settings and case dispositions over a specified time period; (2) dismissals made by outside counsel performing prosecutorial duties; (3) documentation showing all cases set for trial during this time period and the disposition of those cases; (4) all documentation relating to outside counsel performing prosecutorial duties; and (5) all documentation related to expenses for outside counsel for the year 2013. You state the city does not have information responsive to items 1, 2, and 3 of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.133 of the Government Code, and privileged under Texas Rule of Evidence 503.² We have considered your arguments and reviewed the submitted representative sample of information.³

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you also raise section 552.101 of the Government Code in conjunction with section Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

³We assume that 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.

Initially, we note portions of the information at issue, which we have marked, are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney client privilege[.]

Gov't Code § 552.022(a)(3), (16). The marked information consists of an invoice that is subject to subsection 552.022(a)(3) and attorney fee bills that are subject to subsection 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under section 552.107 of the Government Code. However, section 552.107 is a discretionary exception and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 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 marked information may not be withheld under section 552.107 of the Government Code. You also seek to withhold the marked information under Texas Rule of Evidence 503, which the Texas Supreme Court has held is "other law" within the meaning of section 552.022. *See In re City of Georgetown, 53 S.W.3d 328, 336 (Tex. 2001).* We will therefore consider your assertion of the attorney-client privilege under rule 503 for the marked information. You also raise section 552.133 of the Government Code for a portion of the information subject to section 552.022. We note, section 552.022 does not apply to information subject to section 552.133 of the Government Code. *See Gov't Code § 552.133(d).* Therefore, we will consider the applicability of section 552.133 of the Government Code to the information at issue. Finally, we will address your arguments for the information not subject to section 552.022 of the Government Code.

We will first address your arguments for the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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. ORD 676 at 6-7. First, a governmental body must demonstrate that the information

constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “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). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 information you have marked consists of confidential attorney-client communications made in connection with the rendition of professional legal services to the city. You state this information was not intended to be, and has not been, disclosed to third parties. Based on your representations and our review, we agree the information at issue consists of privileged attorney-client communications. Accordingly, the city may generally withhold the information not subject to section 552.022 of the Government Code you have marked under section 552.107(1) of the Government Code.⁴ We note, however, some of the e-mail strings at issue include e-mails received from or sent to individuals you have not demonstrated are privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city 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 section 552.107(1) of the Government Code.

⁴As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

To the extent the non-privileged e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, you claim they are subject to sections 552.101 and 552.137 of the Government Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the informer's privilege, which has long been recognized by Texas courts. *E.g.*, *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You claim the information you have marked contains the identity of an informer. Upon review, we find the city has failed to demonstrate any of the information at issue consists of a report of a violation of law that carries civil or criminal penalties. *See* Gov't Code § 552.301(e) (stating the burden is on the governmental body to state the reasons why the stated exceptions apply allowing the information to be withheld). Consequently, we conclude the city has not established any of the information at issue is protected by the informer's privilege and the city may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked in the non-privileged e-mails satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate any of the remaining information at issue is private.

Consequently, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). See Gov’t Code § 552.137(a)-(c). Upon review, we find the city must withhold the e-mail addresses we have marked in the non-privileged e-mails under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Next, we address your assertion of the attorney-client privilege for the information subject to section 552.022 of the Government Code. Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides:

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). The elements of the privilege under rule 503 are the same as those discussed for section 552.107 of the Government Code. Upon a demonstration of the 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

As noted, you state the information you have marked consists of confidential attorney-client communications made in connection with the rendition of professional legal services to the city. You state this information was not intended to be, and has not been, disclosed to third parties. Based on your representations and our review of the information at issue, we find the city has established the information we have marked constitutes privileged attorney-client communications under rule 503. Thus, the city may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence.⁵ However, we find the remaining information at issue documents communications with individuals whom you have not demonstrated are privileged parties, or does not document a communication. Therefore, we find you have not demonstrated how the remaining information documents a privileged attorney-client communication for purposes of rule 503. Accordingly, none of the remaining information may be withheld on that basis.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 552.133(b). Section 552.133 of the Government Code provides in relevant part:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

Id. § 552.133(a)-(a-1)(F). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2). You claim the remaining information in Exhibit E is excepted from disclosure under section 552.133. Upon review, we find the city has failed to demonstrate the applicability of section 552.133 to the information at issue, and the city may not withhold it on the basis of section 552.133 of the Government Code.

⁵As our ruling for this information is dispositive, we need not address your argument under section 552.133 of the Government Code against its disclosure.

In summary, with regard to the information not subject to section 552.022 of the Government Code, the city may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, they may not be withheld under section 552.107(1) of the Government Code. In releasing any non-privileged e-mails the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.137 of the Government Code, unless the owners of the e-mail addresses at issue affirmatively consent to their public disclosure. With regard to the information subject to section 552.022 of the Government Code, the city may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 518888

Enc. Submitted documents

c: Requestor
(w/o enclosures)