



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2014

Mr. Albert López
Counsel for the City of New Braunfels
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14310 Northbrook Drive, Suite 200
San Antonio, Texas 78232

OR2014-21435

Dear Mr. Lopez:

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# 544811.

The City of New Braunfels (the "city"), which you represent, received three requests from the same requestor for (1) all e-mails regarding the requestor during a specified time period, (2) all e-mails from the city police department (the "department") regarding the requestor during a specified time period, and (3) certain information, including reports, pertaining to a specified event. You state the city will redact personal e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the attachments to the submitted e-mails consist of court-filed documents and a completed report subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The department must release the completed report, numbered 0700043753, pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Portions of the submitted information also consist of court-filed documents subject to section 552.022(a)(17). The information subject to section 552.022(a)(17) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). Although you seek to withhold report number 0700043753 and the court-filed documents under section 552.107(1) of the Government Code, section 552.107(1) is a discretionary exception to disclosure and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 6 (2002) (Gov't Code § 552.107(1) is not other law for purposes of Gov't Code § 552.022), 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 purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your claim under Texas Rule of Evidence 503 for the information subject to section 552.022. Further, as you raise section 552.108 for report number 0700043753, we will consider your arguments under section 552.108 for the completed report. We will also consider your arguments against disclosure of the remaining 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). *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 indicate the submitted court-filed documents and report number 0700043753 are attachments to e-mail communications between attorneys for the city, outside counsel for the city, and city employees. You state the communications at issue were made in confidence for the purpose of facilitating the rendition of professional legal services and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the court-filed documents. Thus, the city may withhold the court-filed documents under rule 503 of the Texas Rules of Evidence. However, while report number 0700043753 is attached to an otherwise privileged e-mail, if this report is removed from the e-mail to which it is attached and stands alone, it is responsive to the request for information. Therefore, if this report is maintained by the city separate and apart from the otherwise privileged e-mail to which it is attached, then the city may not withhold it under section 552.107(1) of the Government

Code. Upon review, we find report number 0700043753 exists separate and apart from the e-mail to which it is attached. Consequently, the city may not withhold this report under rule 503 of the Texas Rules of Evidence. However, we will address your arguments under section 552.108 for report number 0700043753.

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(1) 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*, 922 S.W.2d 920, 923.

You claim the remaining information is protected by section 552.107(1) of the Government Code. You state the information at issue consists of e-mail communications between attorneys for the city, outside counsel for the city, and city employees. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services and these communications have remained confidential. Based on your representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to some of the submitted information. Thus, the city may generally withhold this information under section 552.107(1) of the Government Code.²

However, some of the otherwise-privileged e-mail strings include e-mails received from or sent to the requestor, who is a non-privileged third party. Furthermore, we find these e-mails are separately responsive. 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 them under section 552.107(1) of the Government Code. Furthermore, we note the remaining information contains department incident report number 14-37150, which is attached to a privileged e-mail. We find this report is separately responsive to the request. Further, we find report number 14-37150 exists separate and apart from the e-mail to which it is attached. Consequently, the city may not withhold report number 14-37150 under section 552.107. We further find the remaining e-mails reflect communications with the requestor, a non-privileged third party. Therefore, the city may not withhold this information, which we have marked for release, under section 552.107(1). However, we will address your arguments under section 552.108 for report number 14-37150 and the remaining information.

You claim section 552.108(a)(1) of the Government Code for the remaining information. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the remaining information relates to an ongoing criminal investigation regarding report number 14-37150. Upon review, we conclude the release of report number 14-37150 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to that report. However, we find you have not demonstrated how the remaining information would interfere with the ongoing criminal investigation. As such, we find the city may not withhold the remaining information under section 552.108(a)(1) of the Government Code.

Further, we note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, the city may withhold report number 14-37150 under section 552.108(a)(1) of the Government Code.

In summary, the city may withhold the court-filed documents under rule 503 of the Texas Rules of Evidence. The city must release report number 0700043753.³ With the exception of basic information, which must be released, the city may withhold report number 14-37150 under section 552.108(a)(1) of the Government Code. With the exception of the information we have marked for release, the city may generally withhold the remaining information 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, the city must release them.

³We note incident report number 0700043753 contains the requestor’s driver’s license information and social security number, to which the requestor has a right of access pursuant to section 552.023 of the Government Code. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). We further note incident report number 0700043753 contains social security numbers of individuals other than the requestor. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 544811

Enc. Submitted documents

c: Requestor
(w/o enclosures)