



January 13, 2015

Mr. Jeffrey L. Moore
Counsel for the City of Roanoke
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2015-00628

Dear Mr. Moore:

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# 550215.

The City of Roanoke (the "city"), which you represent, received a request for information related to a specified proposed project and a specified vested rights determination. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

Next, we note the submitted responsive information contains a public meeting agenda of the city Zoning Board of Adjustment. The notices, agendas, and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's

designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under sections 552.103 and 552.107, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release the agenda we have marked pursuant to chapter 551 of the Government Code.

We further note the submitted responsive information contains information subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(3). This information, which we have marked, is subject to section 552.022(a)(3) and must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (governmental body may waive attorney-client privilege under section 552.107(1)), 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 under section 552.103 or 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 address your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information that is subject to section 552.022. We will also address your arguments under sections 552.103 and 552.107 for the information that is 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 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 assert the information subject to section 552.022 is part of an attachment to a confidential communication made in furtherance of legal services rendered to the city. You state this communication was exchanged between city staff, city consultants, and city attorneys. You further state this communication was intended to be confidential and confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the information subject to section 552.022 under Texas Rule of Evidence 503.

We will now address your arguments against disclosure for the information not subject to section 552.022. Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You claim the remaining responsive information pertains to pending litigation. You state, and provide documentation showing, there is a pending lawsuit to which the city is a party concerning the information at issue. However, we note the lawsuit was filed after the date the city received the present request for information. Therefore, we find litigation was not pending on the date the city received this request. Accordingly, we find you have failed to demonstrate the city was involved in pending litigation relating to the information at issue at the time it received this request for information. Furthermore, you do not explain the city anticipated litigation at the time of the request. Therefore, the city may not withhold any of the remaining responsive information under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) 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. 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 at 923.

You state some of the remaining responsive information consists of confidential communications made in furtherance of legal services rendered to the city. You state these communications were exchanged between city staff, city consultants, and city attorneys. You state these communications were intended to be confidential and confidentiality has been maintained. Based on your representations and our review, we find the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, some of the otherwise-privileged e-mail strings include e-mails received from or sent to non-privileged third parties. We find some of 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 find the remaining responsive information you seek to withhold consists of communications to individuals you have not demonstrated are privileged parties. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining responsive information you have marked, and the city may not withhold this information under section 552.107(1).

Section 552.137 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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the e-mail address you have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

We note some of the remaining responsive information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Open Records Decision No. 180 at 3 (1977)*. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see Open Records Decision No. 109(1975)*. If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must release the agenda we have marked pursuant to chapter 551 of the Government Code. The city may withhold the information subject to section 552.022 under Texas Rule of Evidence 503. The city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the e-mails we have marked as non-privileged 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. The city must withhold the e-mail address you have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure. The remaining responsive information must be released; however, any information that is subject to copyright may be released only in accordance with copyright law.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/ac

Ref: ID# 550215

Enc. Submitted documents

c: Requestor
(w/o enclosures)