



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 15, 2015

Ms. Lisa D. Mares  
Counsel for City of Keene  
Brown & Hofmeister L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75801

OR2015-09533

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# 563809.

The City of Keene (the "city"), which you represent, received a request for any documents and communications mentioning two named individuals and a specified entity since a specified date and any correspondence sent by a named individual to the city since a specified date.<sup>1</sup> You state you have provided the requestor with some of the requested information. 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 have also received and considered

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<sup>1</sup>We note the city sought and received clarifications of this request from the requestor. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requester to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). We also note the city sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the city received the required deposit on February 24, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

comments from the requestor. *See* Gov't Code § 552.304 (providing an interested party may submit documents stating why information should or should not be released).

We note portions of the submitted information 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[.]

*Id.* § 552.022(a)(3). The submitted information contains a contract that is subject to subsection 552.022(a)(3). The city must release the contract subject to subsection 552.022(a)(3) unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the information subject to subsection 552.022(a)(3) under section 552.107 of the Government Code. However, this is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (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). Thus, the information subject to section 552.022 may not be withheld under section 552.107 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "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 of the Texas Rules of Evidence for the information subject to subsection 552.022(a)(3). We will also consider your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503 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 to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* ORD 676. 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 communication 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 [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You indicate the contract subject to subsection 552.022(a)(3) consists of an attachment to a privileged attorney-client communication between attorneys for the city and city staff and officials that was made for the purpose of providing legal services to the city. We note, however, the contract is an executed agreement between the city and an individual who is not a privileged party. If the contract is removed from the e-mail string and stands alone, it is responsive to the request for information. Furthermore, we find the contract is maintained by the city separate and apart from the communication to which it is attached. Thus, we conclude the city may not withhold the contract we have marked under rule 503.

We now address your arguments for the remaining information in Exhibit B-2 not subject to section 552.022. Section 552.107(1) of the Government Code protects information coming 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. 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 assert the remaining information in Exhibit B-2 consists of communications between attorneys for the city, city staff and officials, and consultants hired by the city. You further state the communications were made for the purpose of facilitating the rendition of professional legal services to the city, and the confidentiality of the communications has been maintained. However, we understand the requestor to assert the communications were shared with two individuals who, the requestor claims, were not privileged parties. Here, the city explains the outside consultants hired by the city are privileged for the purposes of the communications at issue. Based on these 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 in Exhibit B-2. We note, however, some of these otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments 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 and attachments are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear or to which they are attached, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. We find the remaining e-mails were sent to or from individuals you have not demonstrated are privileged parties. Thus, the city may not withhold the remaining e-mails under section 552.107(1).

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 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 or 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). You contend Exhibit B-1 contains highly intimate or embarrassing information that is of no legitimate public interest because it is personal information. Upon review, we find you have failed to demonstrate the information at issue is highly intimate or embarrassing. Therefore, the city may not withhold the information in Exhibit B-1 under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.<sup>2</sup> *See Gov't Code § 552.117(a)(1)*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1).

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 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)*. Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id. § 552.137(c)*. The e-mail addresses we have marked are not of the types specifically excluded by subsection (c). Thus, we find the city must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city may withhold the information we have marked in Exhibit B-2 under section 552.107(1) of the Government Code. However, if the non-privileged e-mails and attachments we have marked are maintained by the city and exist separate and apart from the otherwise privileged e-mail string in which they appear or to which they are attached, then, the city must release the non-privileged e-mails and attachments. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to disclosure. The remaining information must be released.<sup>3</sup>

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](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,



Mili Gosar  
Assistant Attorney General  
Open Records Division

MG/som

Ref: ID# 563809

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>We note the requestor has a right of access to his own personal e-mail address in the information that is being released. *See* Gov't Code § 552.137(b) (personal email address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).