



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 15, 2015

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

OR2015-19158

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# 579160 (GC No. 22462).

The City of Houston (the "city") received a request for e-mails authored or received by the mayor during a specified time period. You state the city will release some information. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note Exhibit 3 is not responsive to the instant request because it pertains to information that is outside of the specified time period. 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 some of the information in Exhibit 4, which we have marked, consists of completed reports that are subject to section 552.022 of the Government Code. This section provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although the city asserts the information at issue is excepted from disclosure under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interest

and does not make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information at issue under section 552.107. However, 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, 3636 (Tex. 2001). Accordingly we will consider the city’s assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider the city’s argument under section 552.107 for the remaining information in Exhibit 4 that is not subject to section 552.022. We will also consider the city’s remaining 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:

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 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 [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the information subject to section 552.022 consists of attachments to a privileged attorney-client communication between attorneys for the city and city employees. You state the communication at issue was made for the purpose of the rendition of legal services to the city. You state the city has not waived the attorney-client privilege with regard to the communication. Based on the city's representation and our review of the information at issue, we find the city has established the information at issue constitutes attorney-client communications under rule 503. Thus, the city may withhold the information subject to section 552.022 of the Government Code, which we have marked, pursuant to Rule 503 of the Texas Rules of Evidence.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *9 (Tex. June 19, 2015). You represent Exhibit 2 pertains to a competitive bidding situation. In addition, you assert release of Exhibit 2 would give advantage to competitors or bidders because respondents to the request for proposals may be less willing to negotiate terms in a manner favorable to the city. After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Exhibit 2 under section 552.104(a) of the Government Code.¹

Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those 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. *See Huie*, 922 S.W.2d at 923.

You claim the remaining information in Exhibit 4 consists of a communication between attorneys for the city and city employees. You state the communication was made for the

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

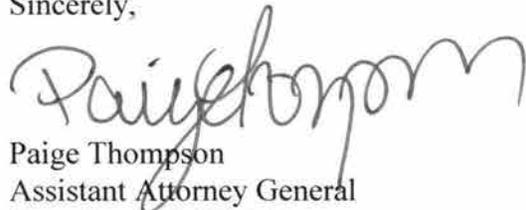
purpose of facilitating the rendition of professional legal services to the city. You further state this communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information in Exhibit 4. Thus, the city may withhold the remaining information in Exhibit 4 under section 552.107(1) of the Government Code.

In summary, the city may withhold the information subject to section 552.022 of the Government Code, which we have marked, pursuant to Rule 503 of the Texas Rules of Evidence. The city may withhold Exhibit 2 under section 552.104(a) of the Government Code and the remaining information in Exhibit 4 under section 552.107(1) of the Government Code.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/bhf

Ref: ID# 579160

Enc. Submitted documents

c: Requestor
(w/o enclosures)