



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 12, 2016

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2016-03492

Dear Ms. Evans:

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# 598321 (GC No. 22849).

The City of Houston (the "city") received a request for information pertaining to a specified letter. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information is 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:

...

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

Gov't Code § 552.022(a)(17). The submitted information contains court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is

made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(17) under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature 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). Therefore, the court-filed documents 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 section 552.022(a)(17). We will also consider your argument under section 552.107 against disclosure of the information not subject to section 552.022.

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 submitted court-filed documents are attachments to an e-mail communication between city staff and a city attorney. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the city. You further state the 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 information at issue. Thus, the city may generally withhold the court-filed documents under Rule 503 of the Texas Rules of Evidence. We note, however, the attachments were received from an individual you have not demonstrated is privileged. Furthermore, if the court-filed documents are removed from the e-mail and stand alone, they are responsive to the request for information. Therefore, if the court-filed documents, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail string to which it they are attached, then the city may not withhold these attachments under rule 503.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 from disclosure 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).

You claim the submitted information that is not subject to section 552.022 is excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between a city attorney and city employees, and the communications were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state the city has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most the information at

issue. However, we find you have not demonstrated the information we marked for release constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the city may not withhold the information we marked for release under section 552.107(1). Accordingly, with the exception of the information we marked for release, the city may generally withhold the submitted information not subject to section 552.022(a)(17) of the Government Code under section 552.107(1) of the Government Code. However, we note the otherwise privileged e-mail strings includes attached information that was sent to the city by a non-privileged party. If this information is removed from the privileged e-mail strings and stands alone, it is responsive to the request for information. Therefore, if this non-privileged information, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail strings in which it appears, then the city may not withhold this information under section 552.107(1) of the Government Code.

To the extent the non-privileged attachments exist separate and apart from the otherwise privileged e-mail strings, we note they contain information subject to sections 552.101, 552.130, and 552.137 of the Government Code.¹ Section 552.101 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.² *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Thus, the city must withhold the public citizens’ dates of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, the city must withhold any discernible motor vehicle record information in the remaining information under section 552.130 of the Government Code.

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 id.* § 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). We note the requestor has a right of access to his client's e-mail address under section 552.137(b). *See id.* § 552.137(b). Accordingly, with the exception of the requestor's client's e-mail address, the city must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosures or if subsection (c) applies.

We note some of the remaining 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.

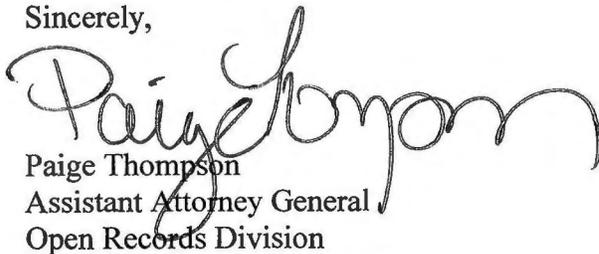
In summary, the city may generally withhold the court-filed documents, which we have marked under Rule 503 of the Texas Rules of Evidence. If the court-filed documents, are maintained by the city separate and apart from the otherwise privileged e-mail string to which they are attached, then the city may not withhold these attachments under rule 503. With the exception of the information we marked for release, the city may generally withhold the submitted information not subject to section 552.022(a)(17) of the Government Code under section 552.107(1) of the Government Code. If the non-privileged information, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail strings in which it appears, then the city may not withhold this information under section 552.107(1) of the Government Code. To the extent the non-privileged attachments exist separate and apart from the otherwise privileged e-mail strings, the city must withhold (1) the public citizens' dates of birth we marked under section 552.101 of the

Government Code in conjunction with common-law privacy; (2) any discernible motor vehicle record information in the remaining information under section 552.130 of the Government Code; and (3) the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosures or if subsection (c) applies. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.³

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/dls

Ref: ID# 598321

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates, or that party's representative, solely on grounds that information is considered confidential by privacy principles).