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ATTORNEY GENERAL OF TEXAS

July 19, 2016

Mr. William S. Helfand
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1200 Smith Street, Suite 1400
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OR2016-16286

Dear Mr. Helfand:

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# 619151.

The Sabine River Authority of Texas (the "authority"), which you represent, received a request for (1) all e-mails sent from a named individual during a specified time period; (2) information showing the date and time all employees worked during a specified time period; and (3) information showing the departments, job titles, and salaries for all current employees. You state the authority has released some information to the requestor. You claim portions of the submitted information are either not subject to the Act or excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you argue Exhibit D is not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as

¹We note the authority did not raise sections 552.117 and 552.137 of the Government Code within ten business days of the date the authority received the request. *See* Gov't Code § 552.301(b). Notwithstanding the authority's violation of section 552.301(b), we will address the applicability of sections 552.117 and 552.137 to the submitted information as they are mandatory exceptions that can provide compelling reasons to overcome the presumption of openness. *See id.* § 552.302.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You assert Exhibit D consists of e-mails that do not concern the official business of the authority. You argue these e-mails do not constitute public information since the nature of these communications do not pertain to the transaction of the authority's official business. Based upon your representations and our review of the information at issue, we find Exhibit D does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, we conclude Exhibit D is not subject to the Act and need not be released in response to the present request for information.

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

Additionally, we note some of the requested information may be the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-12794 (2016). In that ruling, we determined the authority may withhold the information at issue under section 552.103(a) of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the authority may rely on Open Records Letter No. 2016-12794 as a previous determination and withhold the identical information in accordance with that ruling.³ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the prior ruling, we will consider your arguments against disclosure.

Next, 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:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

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

Gov't Code § 552.022(a)(16), (17). The information submitted as Exhibit B contains attorney fee bills subject to section 552.022(a)(16), and the information submitted as Exhibit E contains a court-filed document subject to section 552.022(a)(17). The authority must release this information unless it is made confidential under the Act or other law. See *id.* § 552.022(a)(16), (17). Although you assert the attorney fee bills in Exhibit B are excepted from disclosure under section 552.107(1) of the Government Code and the court-filed document in Exhibit E is excepted from disclosure under sections 552.103 and 552.107(1) of the Government Code, these section 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) (attorney-client

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the authority may not withhold the court-filed document in Exhibit E under section 552.103 of the Government code. Likewise, the authority may not withhold the attorney fee bills or court-filed document under section 552.107(1) of the Government Code. However, the attorney-client privilege is also found under Texas Rule of Evidence 503. 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). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the attorney fee bills in Exhibit B and the court-filed document in Exhibit E. We will also consider each of your arguments for the information not subject to section 552.022.

Texas Rule of Evidence 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 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 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. *See* ORD 676. 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 attaches to complete communication, including factual information).

You assert the submitted attorney fee bills must be withheld in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). Accordingly, the authority may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

You also assert the submitted fee bills include privileged attorney-client communications between the authority’s attorneys and authority employees and officials in their capacities as clients. Further, you assert the court-filed document was included in privileged attorney-client communications. You state the communications at issue were made for the purpose of the rendition of legal services to the authority. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the authority has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the authority may withhold the court-filed document and the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate the remaining information consists of privileged attorney client communications. Accordingly, no portion of the remaining information at issue may be withheld under rule 503.

You seek to withhold the responsive information in Exhibit C under section 552.101 of the Government Code in conjunction with section 418.181 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. 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. This exception encompasses information that is made confidential by other statutes, including section 418.181 of the HSA. Section 418.181 provides as follows:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. *See generally id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact information may be related to a governmental body’s security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). You argue “[t]he [r]equest seeks . . . e[-]mails regarding critical aspects of Toledo Bend” and “Toledo Bend clearly constitutes critical infrastructure.” However, upon review, we find you have failed to demonstrate any of the information at issue identifies the technical details of particular vulnerabilities of critical infrastructure. Consequently, the authority may not withhold any portion of the responsive information in Exhibit C under section 552.101 in conjunction with section 418.181 of the Government Code.

Section 552.103 of the Government Code provides, in relevant part:

(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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W. 2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st

Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

You state, prior to the authority's receipt of the instant request, two lawsuits styled *Perry Bonin, et al v. Sabine River Authority of Texas, et al*, Cause No. B160137-C, and *City of Dallas v. Sabine River Authority of Texas*, Cause No. D-1-GN-15-000398, were filed against the authority and are currently pending in the 163rd Judicial District Court of Orange County, Texas and in the 53rd Judicial District Court of Travis County, Texas, respectively. Therefore, we agree litigation was pending on the date the authority received the present request for information. You also state, and we agree, the remaining information in Exhibit E pertains to the substance of these pending lawsuits. Based on your representations and our review, find the information at issue is related to the pending litigation. Accordingly, the authority may withhold the remaining information in Exhibit E under section 552.103(a) of the Government Code.⁴

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 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. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You state the remaining information in Exhibit B consists of communications involving attorneys for the authority and authority employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the authority. We understand these communications were intended to be, and have 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. Accordingly, the authority may withhold the remaining information in Exhibit B under section 552.107(1) of the Government Code.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We also note a post office box number is not a "home address" for purposes of section 552.117(a). *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home). 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 individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the authority may not withhold the marked information 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). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the authority must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁵

In summary, Exhibit D is not subject to the Act and need not be released in response to the present request for information. To the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the authority may rely on Open Records Letter No. 2016-12794 as a previous determination and withhold the identical information in accordance with that ruling. The authority may withhold (1) the court-filed document and the information we have marked within the submitted attorney fee

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

bills pursuant to rule 503 of the Texas Rules of Evidence; (2) the remaining information in Exhibit E under section 552.103(a) of the Government Code; and (3) the remaining information in Exhibit B under section 552.107(1) of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. The authority must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released.

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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 619151

Enc. Submitted documents

c: Requestor
(w/o enclosures)