



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 28, 2016

Mr. Scott M. Felton
County Judge
McLennan County
P.O. Box 1728
Waco, Texas 76703

OR2016-09625

Dear Mr. Felton:

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# 607807.

McLennan County (the "county") received a request for correspondence pertaining to specified contracts previously provided to the requestor. You state you released some information. You indicate you will withhold e-mail addresses under 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.² 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:

...

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of 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.

²Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, we note section 552.101 does not encompass other exceptions in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(3), (18). The submitted information contains invoices and a contract relating to the expenditure of funds by the county, subject to section 552.022(a)(3), as well as a settlement agreement to which the county is a party, subject to section 552.022(a)(18). This information must be released unless it is made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 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 (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 county may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. 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, 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. We will also consider your argument under section 552.107 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. 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert the information at issue was communicated between an in-house attorney, an outside attorney for the county, and county staff. You state the communications at issue were made for the purpose of the rendition of legal services to the county and the confidentiality of the communications has been maintained. Based on your representations and our review of the information at issue, we find the county has established the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the county may withhold the information subject to section 552.022 pursuant to rule 503 of the Texas Rules of Evidence.

You claim section 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. 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. *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 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 inform us the remaining information consists of communications between attorneys for the county and county staff that were made for the purpose of the rendition of legal services to the county. You state the communications were intended to be confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the remaining information. Accordingly, the county may generally withhold the remaining information under section 552.107(1) of the Government

Code. We note, however, some of these e-mail strings include communications from an individual whom you have not identified as privileged. Furthermore, if the e-mails received from the non-privileged individual 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, which we have marked, are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

In summary, the county may withhold the information subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. The county may withhold the remaining information under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, the county must release the non-privileged e-mails.

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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 607807

Enc. Submitted documents

c: Requestor
(w/o enclosures)