



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2016

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2016-19405

Dear Ms. Nicholson:

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# 624431 (PIR# 27110).

The City of Austin (the "city") received a request for specified records pertaining to a specified lawsuit. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record[,]" unless the information is expressly made confidential under the Act or other law. Gov't Code § 552.022(a)(17). You seek to withhold the information at issue under section 552.107 of the Government Code. However, this is a discretionary exception that does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2012) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions

¹We 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 that those records contain substantially different types of information than that submitted to this office.

generally). As such, the city may not withhold any portion of the information subject to section 552.022 of the Government Code 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, 336 (Tex. 2001). Accordingly, we will address your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information that is subject to section 552.022 of the Government Code. Further, we will address your claims under sections 552.107 and 552.111 for the information that is 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 subject to section 552.022 consists of an attachment to an e-mail that was communicated between the city's Law Department and city employees and officials. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the city and this communication has remained confidential. However, we note this attachment was seen by non-privileged parties and, if it is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if this non-privileged attachment, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail to which it is attached, then the city may not withhold the attachment under Texas Rule of Evidence 503. If the attachment subject to section 552.022 we have marked does not exist separate and apart from the e-mail to which it is attached, the city may withhold it under rule 503.

Next, we turn to the information not subject to section 552.022 of the Government Code. 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 an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie 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 A consists of confidential communications involving the city's Law Department and city employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the city may generally withhold the remaining information in Exhibit A under section 552.107(1) of the Government Code. However, we note the information at issue includes an e-mail attachment received from a non-privileged party. Furthermore, if this attachment is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if the city maintains this non-privileged attachment, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this non-privileged e-mail attachment under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” See Gov’t Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

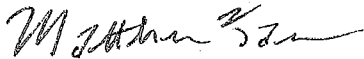
You assert the information in Exhibit B is attorney work product protected under section 552.111. You state the information at issue was created by attorneys and legal staff representing the city in anticipation of and in preparation for litigation. You represent the information at issue reflects the mental impressions, conclusions, and legal theories of attorneys representing the city. Based on your representations and our review, we conclude the city may withhold Exhibit B under the work product privilege encompassed by section 552.111 of the Government Code.

In summary, if the attachment subject to section 552.022 of the Government Code we have marked does not exist separate and apart from the e-mail to which it is attached, the city may withhold it under Texas Rule of Evidence 503. The city may generally withhold the remaining information in Exhibit A under section 552.107(1) of the Government Code. However, if the city maintains the non-privileged attachment, which we have marked, separate and apart from the otherwise privileged e-mail string to which it is attached, then the city may not withhold this non-privileged e-mail attachment under section 552.107(1) of the Government Code. The city may withhold the information in Exhibit B under the work product privilege encompassed by section 552.111 of the Government Code. The city must release the remaining information.

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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/dls

Ref: ID# 624431

Enc. Submitted documents

c: Requestor
(w/o enclosures)