



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2017

Ms. Elizabeth Cater
Attorney
Texas Parks & Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2017-09229

Dear Ms. Cater:

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# 655913 (TPWD #s 2017-02-R23, 2017-02-R30, & 2017-02-R36).

The Texas Parks & Wildlife Department (the "department") received three requests from the same requestor for information pertaining to Cedar Hill State Park and Joe Pool Marina. You state you released some information. 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 representative sample of information.¹

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:

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

...

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

Gov't Code § 552.022(a)(3). The submitted information includes executed contracts relating to the receipt or expenditure of funds by the department that are subject to section 552.022(a)(3). This information, which we marked, 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)(3) 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 information subject to section 552.022(a)(3) may not be withheld 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. We will consider your argument under section 552.107 of the Government Code for 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).

We note the information subject to section 552.022(a)(3) consists of attachments to e-mail communications you state are between department attorneys and employees made in furtherance of the rendition of professional legal services to the department. You state these e-mail communications were intended to be confidential and were not disclosed to non-privileged parties. Upon review, we find you have demonstrated the attachments are part of privileged e-mail communications for purposes of rule 503 of the Texas Rules of Evidence. However, we note the attachments reflect they were shared with parties you have failed to demonstrate are privileged. Furthermore, if the attachments are removed from the privileged e-mail communications and stand alone, they are responsive to the request for information. Therefore, if the attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail communications to which they are attached, then the department may not withhold the attachments under rule 503. However, if the attachments are not maintained separate and apart from the otherwise privileged e-mail communications, then the department may withhold this information under rule 503 of the Texas Rules of Evidence.

The department claims section 552.107 of the Government Code for the information not subject to section 552.022. 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 state the information at issue consists of communications between department attorneys and employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the department and these communications have remained confidential. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to the remaining information. Therefore, the department may generally withhold the remaining information under section 552.107(1) of the Government Code. However, some of these e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties 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 and attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

We note portions of the non-privileged e-mails and attachments are subject to sections 552.136 and 552.137 of the Government Code.² Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the department must withhold the insurance policy numbers we have marked under section 552.136 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). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department 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.

In summary, the department may generally withhold the information subject to section 552.022(a)(3), which we marked, under rule 503 of the Texas Rules of Evidence; however, if the information subject to section 552.022(a)(3) is maintained separate and apart from the otherwise privileged e-mail communications to which this information is attached, then the department may not withhold the information subject to section 552.022(a)(3) under rule 503 of the Texas Rules of Evidence. The department may generally withhold the

²The 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).

remaining information under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments we marked are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. In that event, the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code and 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 department must release the remaining non-privileged information we marked to the extent it is maintained separate and apart from the otherwise privileged communications to which it is attached.

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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/sb

Ref: ID# 655913

Enc. Submitted documents

c: Requestor
(w/o enclosures)