



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 7, 2017

Ms. Ann-Marie Sheely  
Assistant County Attorney  
County of Travis  
P.O. Box 1748  
Austin, Texas 78767

OR2017-12526

Dear Ms. Sheely:

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# 660990 (Document# 481380-1).

The Travis County Judge's Office (the "county judge's office") received a request for information pertaining to two named Travis County (the "county") employees and a specified incident. You state some information has been released to the requestor. You state the county judge's office does not maintain information responsive to portions of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note the requestor asks the county judge's office to answer several questions and conduct legal research. The Act does not require a governmental body to answer factual

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We assume that 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.

questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 102. In this instance, the county judge's office has submitted some responsive information for our review. Therefore, we understand the county judge's office has made a good-faith effort to locate any information responsive to the request at issue, and we will address the claimed exceptions for the submitted information.

Additionally, we note the submitted information contains 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 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, 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 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. 328, 336 (Tex. 2001). We will therefore consider the assertion of attorney-client privilege by the county judge's office under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17). We will also consider the argument of the county judge's office under section 552.107 for the information not subject to section 552.022.

Rule 503(b)(1) of the Texas Rules of Evidence 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 information at issue is an attachment to an e-mail communication between attorneys for the county judge’s office, employees of the county judge’s office, and county personnel that were made for the purpose of providing legal services to the county and the county judge’s office. You state the communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find the information at issue consists of a privileged attorney-client communication. Upon review, we find the county judge’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the county judge’s office may withhold the information subject to section 552.022 under rule 503 of the Texas Rules of Evidence.

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*, 922 S.W.2d at 923.

You state the remaining information you have marked consists of communications between attorneys for the county judge’s office, employees of the county judge’s office, and county personnel that were made for the purpose of providing legal services to the county and the county judge’s office. You state the communications were intended to be confidential and

have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Therefore, we find the marked information consists of privileged attorney-client communications the county judge's office may generally withhold under section 552.107(1) of the Government Code.<sup>3</sup> We note, however, one of these otherwise privileged e-mail strings includes an attachment received from and sent to non-privileged parties. Furthermore, if the attachment received from and sent to non-privileged parties 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 this non-privileged attachment, which we have marked, is maintained by the county judge's office separate and apart from the otherwise privileged e-mail string in which it appears, then the county judge's office may not withhold this non-privileged attachment under section 552.107(1). In that event, we address your remaining argument against disclosure of the non-privileged attachment.

You assert the remaining information is confidential under section 154.073 of the Civil Practice and Remedies 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" and encompasses information protected by other statutes. Gov't Code § 552.101. Section 552.101 encompasses section 154.073 of the Civil Practice and Remedies Code which provides in relevant part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). You state the remaining information pertains to a mediation procedure involving the county, the county judge's office, and the Travis County Attorney's Office (the "county attorney's office"). Further, you state the information at issue consists of communications between the county attorney's office and representatives of other parties to the mediation. Upon review, we agree this information at issue consists of records and communications relating to the subject matter of the dispute made by a participant in an

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

alternative dispute resolution procedure. Accordingly, we find the remaining information, which you marked, is confidential under section 154.073(a) of the Civil Practice and Remedies Code and must be withheld under section 552.101 of the Government Code.

In summary, the county judge's office may withhold the information subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. The county judge's office may withhold the information you marked under section 552.107(1) of the Government Code. However, if the non-privileged attachment, which we marked, is maintained by the county judge's office separate and apart from the otherwise privileged e-mail string in which it appears, then the county judge's office may not withhold this non-privileged attachment under section 552.107(1). The county judge's office must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 154.073(a) of the Civil Practice and Remedies Code.

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](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,



Emily Kunst  
Attorney  
Open Records Division

EK/eb

Ref: ID# 660990

Enc. Submitted documents

c: Requestor  
(w/o enclosures)