



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 6, 2017

Ms. Gloria E. Barnes
Public Information Coordinator
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2017-15033

Dear Ms. Barnes:

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# 665542 (PIR # 2017-04-106).

The Capital Metropolitan Transportation Authority (the "authority") received a request for (1) certain communications involving named individuals during a defined time period, (2) specified cost calculations, and (3) certain records pertaining to route 214. You inform us the authority will release 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 information.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(3). The submitted information includes a contract relating to the receipt or expenditure of public or other funds by a governmental body. The authority must release this information unless it is confidential under the Act or other law. *See id.* 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 authority may not withhold the information subject to section 552.022(a)(3) of the Government Code 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). Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. We will also consider your argument under section 552.107 for the information not subject to section 552.022(a)(3).

Texas Rule of Evidence 503(b)(1) 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 at 6-7. 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 subject to section 552.022(a)(3) consists of a privileged attorney-client communication. You inform us the information at issue, which consists of an e-mail attachment, was communicated between and among authority attorneys and employees for the purpose of the rendition of legal services to the authority. Based on this representation and our review, we find the authority has established the attorney-client privilege is generally applicable to the information at issue. However, we note the information at issue consists of an attachment seen by a non-privileged party. Furthermore, if this e-mail attachment is removed from the e-mail to which it is attached and stands alone, it is responsive to the request for information. Therefore, if the non-privileged attachment subject to section 552.022(a)(3), which we have marked, is maintained by the authority separate and apart from the otherwise privileged e-mail to which it is attached, then the authority may not withhold the attachment under Texas Rule of Evidence 503. In this instance, as you raise no other exceptions to disclosure, the authority must release the information subject to section 552.022(a)(3) of the Government Code. Conversely, if the non-privileged attachment subject to section 552.022(a)(3) of the Government Code, which we have marked, does not exist separate and apart from the e-mail to which it is attached, the authority may withhold it under Texas Rule of Evidence 503.

Next, we address your argument under section 552.107 of the Government Code for the information not subject to section 552.022(a)(3). Section 552.107(1) protects information coming within the attorney-client privilege. 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. *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*, 922 S.W.2d at 923.

You state the information not subject to section 552.022(a)(3) constitutes communications between authority attorneys and employees in their capacity as clients that were made for the purpose of providing professional legal services to the authority. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information not subject to section 552.022(a)(3) of the Government Code consists of privileged attorney-client communications the authority may withhold under section 552.107(1) of the Government Code.

In summary, if the information subject to section 552.022(a)(3) of the Government Code, which we have marked, is maintained by the authority separate and apart from the otherwise privileged e-mail to which it is attached, then the authority must release this information. However, if the non-privileged attachment subject to section 552.022(a)(3) of the Government Code, which we have marked, does not exist separate and apart from the e-mail to which it is attached, the authority may withhold it under rule Texas Rule of Evidence 503. The authority may withhold the information not subject to section 552.022(a)(3) of the Government Code under section 552.107(1) of the Government 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, 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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 665542

Enc. Marked documents

c: Requestor
(w/o enclosures)