



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 11, 2017

Mr. Jim D. McLeroy
Counsel for the City of Quitman
P.O. Box 1253
Sulphur Springs, Texas 75483

OR2017-20663

Dear Mr. McLeroy:

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# 674854.

The City of Quitman (the "city"), which you represent, received two requests from the same requestor for communications mentioning or related to two named individuals during a specified time period, including communications sent or received by specified individuals; information related to a specified investigation; and the personnel file of the requestor's client. You state the city has released some information to the requestor. You also state you have no information responsive to a portion of one of the requests.¹ 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.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests for information because it was created after the city received the requests for information. This ruling does not address the public availability of any information that is not responsive to the requests, and the city is not required to release such information in response to these requests. *See Bustamante*, 562 S.W.2d 266; ORD 452

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

at 3 (governmental body not required to disclose information that did not exist at time request was received).

Next, 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information contains a completed investigation that is subject to section 552.022(a)(1) and court-filed documents that are subject to section 552.022(a)(17). The city must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* § 552.022(a)(1). The city must release the information subject to section 552.022(a)(17) unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). 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 (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 at issue 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.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 of the Government Code. We will also consider your argument against disclosure for the information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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. Upon a demonstration of all three factors, the entire communication is confidential under 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 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 state the information subject to section 552.022 consists of communications between city officials and outside counsel for the city. You also state the communications were made for the purpose of facilitating the rendition of professional legal services to the city. You assert these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may generally withhold the information subject to section 552.022 under Texas Rule of Evidence 503. However, we note some of the information at issue has been seen by

non-privileged parties, and these documents are separately responsive to the request. Accordingly, to the extent the non-privileged information, which we have marked, exists separate and apart from the privileged e-mail communications to which it is attached, the city may not withhold it 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 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 claim the information not subject to section 552.022 is protected by section 552.107(1) of the Government Code. You represent the information at issue consists of communications between city officials and attorneys and outside counsel for the city and their representatives. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may generally withhold the information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if those e-mails and attachments are removed from the otherwise privileged e-mail strings in which they appear 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 city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

In summary, the city may generally withhold the information we marked that is subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence; however, to the extent the marked information exists separate and apart from the otherwise privileged communication to which it is attached, the city must release the marked information. The city may generally withhold the information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mails or attachments we marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, the city must release them.

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,

A handwritten signature in black ink, appearing to read "N. A. Ybarra".

Nicholas Ybarra
Assistant Attorney General
Open Records Division

NY/tdw

Ref: ID# 674854

Enc. Submitted documents

c: Requestor
(w/o enclosures)