



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 19, 2017

Mr. David D. Towler  
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OR2017-21384

Dear Mr. Towler:

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# 676024.

The City of Alice (the "city"), which you represent, received a request for all e-mail communications between two specified individuals during a certain time period.<sup>1</sup> You state the city has released some information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.<sup>2</sup> We have considered the exception you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not consist of an e-mail communication. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release such information in response to this request.

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<sup>1</sup>You state the city sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>Although you also raise the attorney work product privilege, as you have provided no arguments as to the applicability of this privilege, we assume you have withdrawn your claim it applies. *See* Gov't Code §§ 552.301, .302.

Next, we note some of the responsive information consists of attorney fee bills. The submitted attorney fee bills are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(16). You seek to withhold the information at issue under section 552.107(1) of the Government Code. However, this exception does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the city may not withhold the information at issue under section 552.107(1). 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 the city's claims of the attorney-client under rule 503 of the Texas Rules of Evidence for the information at issue. We will also address your argument under section 552.107(1) of the Government Code, as well as section 552.137 of the Government Code, which makes information confidential under the Act, for the responsive information not subject to section 552.022(a)(16).<sup>3</sup>

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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).

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. 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. *See id.* 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 submitted fee bills reflect privileged attorney-client communications between the city’s attorneys and city officials and representatives in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the city. You inform us the communications at issue were not disclosed to third parties, and confidentiality has not been waived. Based on your representations and our review of the information at issue, we find the city has established the information we have marked constitutes attorney-client communications under rule 503. Accordingly, the city may withhold the information we have marked within the submitted attorney fee bills subject to section 552.022(a)(16) of the Government Code pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information either reveals a communication with a party who is not identified as privileged or is not a communication. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Therefore, we find you have failed to demonstrate the remaining information at issue consists of privileged communications for purposes of rule 503. Consequently, you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the city may not withhold it on under rule 503.

You claim section 552.107(1) of the Government Code for the responsive information not subject to section 552.022(a)(16). Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue consists of communications between the city's attorneys and city officials and representatives in their capacities as clients made in furtherance of the rendition of professional legal services to the city. You state the communications were intended to be and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information not subject to section 552.022(a)(16). Therefore, with the exception of the information we have marked for release, the city may generally withhold the information not subject to section 552.022(a)(16) of the Government Code under section 552.107(1) of the Government Code. However, upon review, we find the information we have marked for release has been shared with individuals you have not demonstrated are privileged parties. Therefore, you have failed to establish this information constitutes communications between or among city attorneys, officials, and representatives for the purposes of section 552.107(1). Thus, the city may not withhold this information under section 552.107(1). We note some of the otherwise privileged e-mail strings include e-mails from non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings at issue and stand alone, they are responsive to the instant request. Accordingly, if the city maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1).

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). Gov't Code § 552.137(a)-(c). We are unable to determine whether the personal e-mail addresses, which are located within e-mails communicating official business of the city, belong to city officials or employees. Thus, we must rule conditionally. To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, and to the extent the personal e-mail addresses at issue are the personal e-mail addresses of city officials or employees, this information is not subject to section 552.137 and the city may not withhold it on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of "members of the public" for purposes of Gov't Code § 552.137(a)). Conversely, to the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, and to the extent the personal e-mail addresses at issue are not the personal e-mail addresses of the city officials or employees, this information is subject to section 552.137 and the city must withhold it under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies. In

either instance, the city must withhold the personal e-mail addresses within the remaining responsive information, which are not of the types specifically excluded by section 552.137(c) of the Government Code, under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

In summary, the city may withhold the information we have marked within the submitted attorney fee bills subject to section 552.022(a)(16) of the Government Code pursuant to rule 503 of the Texas Rules of Evidence. Except for the information we have marked for release, the city may generally withhold the information not subject to section 552.022(a)(16) of the Government Code under section 552.107(1) of the Government Code. However, if the city maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code, and must release them. In releasing the non-privileged e-mails, to the extent the personal e-mail addresses at issue are not the personal e-mail addresses of the city officials or employees, the city must withhold the personal e-mail addresses at issue under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies. Regardless, the city must withhold the personal e-mail addresses within the remaining responsive information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The city must release the remaining responsive 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](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# 676024

Enc. Submitted documents

c: Requestor  
(w/o enclosures)