



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2017

Mr. Jason M. Cordoba
Counsel for Port Freeport
Cordoba Law Firm, P.L.L.C.
85 Oak Drive, Suite 102
Lake Jackson, Texas 77566

OR2017-22286

Dear Mr. Cordoba:

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# 677297.

The Port Freeport and the Board of Pilot Commissioners for Port Freeport (collectively, the "board"), which you represent, received a request for twelve categories of information pertaining to pilotage fees and services.¹ The board claims the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence.² We have considered your arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to categories three and five of the request for information. To the extent any information responsive to these portions of the request existed on the date the board received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See*

¹As you have not submitted a copy of the original request for information, we take our description from your brief.

²Although we understand the board to raise section 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5, it has not submitted arguments explaining how the submitted information is excepted from release on any of these grounds. Therefore, we presume the board no longer asserts these grounds to withhold the information at issue. *See* Gov't Code §§ 552.301, .302. The board also raises section 552.022 of the Government Code; however, this section is not an exception to disclosure under the Act.

Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the board's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You state the board received the instant request on July 12, 2017. However, as of the date of this letter, you have not submitted a copy of the request for information. Consequently, we find the board failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Although you claim section 552.103 for some of the submitted information, you have failed to establish a compelling reason to address this exception. However, we will consider the board's claims under section 552.107 of the Government Code and rule 503 of the Texas Rules of Evidence for the submitted information.

We further note the submitted information contains minutes of a public meeting. The agendas and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under section 552.107 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the board must release the submitted minutes, which we have indicated, pursuant to Chapter 551 of the Government Code.

We note section 552.022 of the Government Code is applicable to some of the remaining submitted information. Section 552.022(a) reads, in relevant part, as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (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 a contract related to the expenditure of public funds that is subject to subsection 552.022(a)(3). Although you raise section 552.107 for this information, this is a discretionary exception to disclosure that 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). Therefore, the information at issue may not be withheld under this exception. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your argument under Texas Rule of Evidence 503.

Texas Rule of Evidence 503(b)(1) provides the following:

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 indicate the information consists of a privileged attorney-client communication between attorneys for and employees of the board and was communicated for the purpose of the rendition of legal services to the board. You indicate the information at issue has not been, and was not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the board has established the information constitutes a privileged attorney-client communication under rule 503. Thus, the board may withhold the information at issue, which we have marked, pursuant to rule 503 of the Texas Rules of Evidence.

Next, we address your argument under section 552.107 of the Government Code. 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.

The board represents the information it has marked under section 552.107(1) consists of confidential communications between attorneys for and representatives of the board that were made in furtherance of the rendition of professional legal services. The board also asserts these communications were intended to be confidential and their confidentiality has been maintained. Thus, we find the board has established some of the remaining information at issue constitutes privileged attorney-client communications. Consequently, the board may withhold the we have marked under section 552.107(1) of the Government Code. However, upon review, we find you have failed to demonstrate the remaining information at issue

consists of privileged attorney-client communications. Therefore, the board may not withhold any portion of the remaining information under section 552.107 of the Government Code.

In summary, the board must release the submitted minutes, which we have indicated, pursuant to Chapter 551 of the Government Code. The board may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. The board may withhold this information, which we have marked, under section 552.107(1) of the Government Code. The board must release the remaining 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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/gw

Ref: ID# 677297

Enc. Submitted documents

cc: Requestor
(w/o enclosures)