



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 7, 2018

Ms. Roberta B. Cross
Township Attorney
Township of The Woodlands
2801 Technology Forest Boulevard
The Woodlands, Texas 77381

OR2018-02854

Dear Ms. Cross:

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# 693823 (Request ID 66039538; Trace No. 302OR66472694).

The Township of the Woodlands (the "township") received a request for all official communications regarding a specified property.¹ You state you will release some information. The township states it will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim some of the submitted 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

¹You state the township sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.

Evidence.³ We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2017-27765 (2017). In that ruling, we determined: (1) the township may withhold the information subject to section 552.022 under Texas Rule of Evidence 503; (2) with the exception of the information we have marked for release, the township may withhold Exhibits 9A and 9C under section 552.103 of the Government Code; (3) the township may withhold the information you marked in Exhibit 9B under section 552.107(1) of the Government Code; and (4) the township must release the remaining information. You note, however, the anticipated litigation the township relied on to withhold the information at issue in Open Records Letter No. 2017-27765 under section 552.103 is no longer anticipated; rather, the litigation is now pending. Therefore, the facts and circumstances have changed with respect to any information previously withheld under section 552.103 of the Government Code. Accordingly, the township may not rely on Open Records Letter No. 2017-27765 with respect to that information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we have no indication the law, facts, or circumstances on which the previous ruling was based have changed with respect to the remaining information at issue. Thus, the township may continue to rely on Open Records Letter No. 2017-27765 as a previous determination and withhold or release the remaining information at issue in accordance with that ruling. *See id.* Additionally, we will consider your arguments for the submitted information not subject to the previous ruling.

Next, we note some of the information at issue 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:

³Although you also raise section 552.111 of the Government Code, you make no arguments regarding this provision. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

⁴We assume 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 those records contain substantially different types of information than that submitted to this office.

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

Gov't Code § 552.022(a)(1). The information we marked consists of completed reports subject to section 552.022(a)(1). The township must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise sections 552.103 and 552.107 of the Government Code for the information at issue, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(1), which we marked, may be withheld under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence is “other law” that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. Further, we will consider your arguments under sections 552.103 and 552.107 for the information not subject to section 552.022.

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 state the information subject to section 552.022 consists of communications involving township attorneys and township officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the township and have remained confidential. Upon review, we find you have established the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the township may withhold the information subject to section 552.022 under Texas Rule of Evidence 503. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for

information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The township states, and provides documentation showing, a lawsuit styled *The Woodlands Township v. Martinez*, Cause No. 17-10-12893, was pending in the 284th Judicial District Court of Montgomery County, Texas, when it received the instant request for information. You state the submitted information is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the submitted information, we find litigation was pending when the district received this request for information, and the submitted information is related to the pending litigation for the purposes of section 552.103. Therefore, the district may withhold the information you marked under section 552.103(a) of the Government Code.⁵

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those 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. *See Huie*, 922 S.W.2d at 923.

You state the information at issue consists of communications involving township attorneys and township officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the township and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the township may withhold the information you marked under section 552.107(1) of the Government Code.⁶

⁵As our ruling is dispositive, we need not address the township's remaining argument against disclosure of the information at issue.

⁶As our ruling is dispositive, we need not address the township's remaining argument against disclosure of the information at issue.

In summary, except for the information previously withheld under section 552.103 of the Government Code, the township may continue to rely on Open Records Letter No. 2017-27765 as a previous determination and withhold or release the remaining information at issue in accordance with that ruling. The township may withhold the information subject to section 552.022 under Texas Rule of Evidence 503. The township may withhold the information you marked under section 552.103 of the Government Code. The township may withhold the information you marked under section 552.107(1) of the Government Code. The township 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/gw

Ref: ID# 693823

Enc. Submitted documents

c: Requestor
(w/o enclosures)