



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

January 14, 2019

Ms. Sarah E. Alexander  
Warrant Officer 1  
Legal Administrator - Open Records  
Texas Military Department  
P.O. Box 5218  
Austin, Texas 78763-5218

OR2019-01065

Dear Ms. Alexander:

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# 745889.

The Texas Military Department (the "department") received a request for a specified investigation.<sup>1</sup> The department claims the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

---

<sup>1</sup>The department states it received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Although the department also raises section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for information the department holds in its capacity as employer.

[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[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation that is subject to section 552.022(a)(1). The department 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 is made confidential under the Act or other law. *See id.* The department seeks to withhold the information at issue under sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 are discretionary in nature and do 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), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).* Therefore, the department may not withhold any of the submitted information, which is subject to section 552.022(a)(1), under section 552.107 or section 552.111 of the Government Code. However, the department seeks to withhold the information subject to section 552.022(a)(1) under rule 503 of the Texas Rules of Evidence. 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). Therefore, we will consider the department's assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Further, because sections 552.101 and 552.117 of the Government Code make information confidential under the Act, we will consider the department's arguments under these exceptions for the information at issue.

Texas Rule of Evidence 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

(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).

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. 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). *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).

The department states the information at issue consists of communications involving attorneys for the department and department officials and staff members in their capacities as clients. The department also states the communications were made in furtherance of the rendition of professional legal services to the department, and the communications were intended to be confidential. Based upon these representations and our review, we find the department demonstrated the applicability of the attorney-client privilege to the information it marked. Accordingly, the department may withhold the information it marked under Texas Rule of Evidence 503.<sup>3</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 437.232 of the Government Code, which provides as follows:

(a) In this section, "military personnel information" means a service member's name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

---

<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

(b) A service member's military personnel information is confidential and not subject to disclosure under Chapter 552.

*Id.* § 437.232. Upon review, we find some of the information at issue consists of military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing "service member" for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that "Texas military forces" for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). We note section 437.232 was intended to protect the privacy interests of military personnel. *See* Senate Research Center, Bill Analysis, H.B. 2152, 84<sup>th</sup> Leg., R.S. (2015) (explaining provision intended to protect military personnel and their families during deployment). Thus, the requestor has a right of access to her information pursuant to section 552.023 of the Government Code and it may not be withheld from her. *See* Gov't Code § 552.023(a) ("person or a person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, with the exception of the information pertaining to the requestor, which we indicated for release, the department must withhold the information it marked and the additional information we indicated to withhold under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code.<sup>4</sup>

Section 552.117(a)(11) of the Government Code exempts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a current or former member of the Texas military forces, as well as information that reveals whether the individual has family members. *See* Gov't Code § 552.117(a)(11). Section 552.117(a)(11) applies to the Texas military forces as that term is defined by section 437.001 of the Government Code. *See id.* § 437.001. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, the department must withhold the cellular telephone number we indicated under section 552.117(a)(11) of the Government Code if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the cellular telephone service is paid for by a governmental body, the department may not withhold the indicated information under section 552.117(a)(11) of the Government Code.

---

<sup>4</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

In summary, the department may withhold the information it marked under Texas Rule of Evidence 503. With the exception of the information we indicated for release, the department must withhold the information it marked and the additional information we indicated to withhold under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The department must withhold the cellular telephone number we indicated under section 552.117(a)(11) of the Government Code if the cellular telephone service is not paid for by a governmental body. The department must release the remaining information.<sup>5</sup>

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,



James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/eb

Ref: ID# 745889

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>5</sup>We note the requestor has a right of access to some of the information being released in this instance. See Gov't Code § 552.023(a); ORD 481 at 4. Thus, if the department receives another request for the same information from a different requestor, the department must again seek a decision from this office.