



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 29, 2019

Mr. Joseph Behnke  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2019-20701A

Dear Mr. Behnke:

Our office issued Open Records Letter No. 2019-20701 (2019) on July 29, 2019. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on July 29, 2019. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code).

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# 791990 (OOG ID Nos. 178-19 and 179-19, DPS PIR# 19-2391).

The Office of the Governor (the "governor's office") received a request for communications pertaining to specified topics. The governor's office states it will continue to rely on Open Records Letter No. 2019-10230 (2019) in regards to some of the requested 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). The governor's office claims some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. The governor's office also indicates it notified the Office of the Attorney General (the "OAG"), the Office of the Secretary of State (the "secretary of state's office"), the Department of Public Safety ("DPS") and an additional interested third party of the request for information and of their right to submit

arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from DPS, the secretary of state's office and an interested third party. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note part 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:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). The submitted information includes a settlement agreement that is subject to section 552.022(a)(18). The governor's office must release this information unless it is made confidential under the Act or other law. *See id.* The governor's office and DPS seek to withhold the information subject to section 552.022(a)(18) 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 governor's office may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. 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). We will therefore consider the assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence by the governor's office for this information. We will also consider the arguments under section 552.107 made by the governor's office against disclosure of 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:

---

<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

(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 [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The governor's office represents the information subject to section 552.022(a)(18) is an attachment to a communication between attorneys and staff for the governor's office and other privileged parties made for the rendition of legal services to the governor's office. Further, the governor's office states the communication at issue was intended to be and has remained confidential. Based on the representations of the governor's office and our review, we find the information subject to section 552.022(a)(18) is a part of a privileged attorney-client communication the governor's office may generally withhold under rule 503

of the Texas Rules of Evidence.<sup>2</sup> However, we note the attachment was sent to or from non-privileged parties. Furthermore, if the attachment is removed from the otherwise privileged communication in which it appears and stands alone, it is responsive to the request for information. Therefore, if this non-privileged attachment, which the governor's office marked, is maintained by the governor's office separate and apart from the otherwise privileged communication in which it appears, then the governor's office may not withhold this non-privileged attachment under rule 503.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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.

The governor's office states the remaining information it marked consists of communications between attorneys and staff for the governor's office and other privileged parties made for the rendition of legal services to the governor's office. The governor's office states the communications were intended to be and have remained confidential. Based on these representations and our review, we find the remaining information at issue consists of privileged attorney-client communications. Thus, the governor's office may withhold the information it marked that is not subject to section 552.022 under section 552.107(1) of the Government Code.<sup>3</sup>

We next note section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 301.020(e) of the Government Code provides that "[i]nformation held by a general investigating committee is confidential and not subject to public disclosure except as provided by the rules of the house establishing the committee." Act of May 27, 2019, 86th Leg., R.S., H.B. 4181, § 9 (to be codified at Gov't Code § 301.020(e)). Based upon our review, we conclude the information we have marked is confidential under section 301.020(e) of the Government Code, and must be withheld under section 552.101 of the Government Code.

In summary, to the extent the information subject to section 552.022(a)(18) is not maintained separate and apart by the governor's office, the governor's office may withhold

---

<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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

the information subject to section 552.022(a)(18) under Texas Rule of Evidence 503. The governor's office may withhold the information it marked that is not subject to section 552.022 under section 552.107(1) of the Government Code. The governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 301.020(e) of the Government Code.

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,



Patrick P. Mehaffy  
Assistant Attorney General  
Open Records Division

PPM/eb

Ref: ID# 791990

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

3 Third Parties  
(w/o enclosures)