



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 1, 2019

Mr. Jeffrey W. Giles
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-21260

Dear Mr. Giles:

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# 778338 (GC No. 25952).

The City of Houston (the "city") received a request for e-mails sent, received, blind copied, or deleted by a named employee with a specified e-mail address between twenty specified e-mail addresses and containing twenty-nine search terms during a stated time period, including text messages between two specified mobile phone numbers during a stated time period. The city states it will make a portion of the responsive information available to the requestor. The city claims the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ Additionally, the city states release of the information at issue may implicate the proprietary interests of United Airlines, Inc. ("United"). Accordingly, the city states, and provides documentation showing, it notified United of the request for information and of its right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have

¹Although the city also raises sections 552.101, 552.104, and 552.110 of the Government Code, the city makes no arguments to support these exceptions. Therefore, we assume the city has withdrawn its claim these sections apply to the information at issue. *See* Gov't Code §§ 552.301, .302.

received comments from United. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note in a letter dated June 20, 2019, the city states it wishes to withdraw its request for an open records decision with regard to Exhibit 3 because the city determined this information was not responsive to the instant request. Additionally, United states the information at issue is not responsive to the instant request. Thus, Exhibit 3 is not responsive to the present request. Further, we note the requestor excludes e-mails containing a specified e-mail address from the scope of the request. Accordingly, the e-mails containing that specified e-mail address are not responsive to the instant request. 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 that information in response to the request.

Next, we note some of the submitted responsive information is subject to section 552.022 of the Government Code, which 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:

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

...

(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)(1), (3). Some of the submitted responsive information, which we marked, consists of a completed report subject to section 552.022(a)(1). The information subject to section 552.022(a)(1) we marked must be released 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.* § 552.022(a)(1). Additionally, some of the remaining responsive information, which we marked, consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the city that is subject to section 552.022(a)(3). The information subject to section 552.022(a)(3) we marked must be released

²We 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 that those records contain substantially different types of information than that submitted to this office.

unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3) The city seeks to withhold the information subject to section 552.022 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 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the city 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). Thus, we will consider the city’s assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider the city’s argument under section 552.107 for the information not subject to section 552.022.

Next, we address Texas Rule of Evidence 503, which encompasses the attorney-client privilege, for the information subject to section 552.022 of the Government Code. Rule 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).

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* 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).

The city states the information subject to section 552.022 of the Government Code documents communications between city attorneys, city employees, city-retained legal counsel, and other privileged parties. The city also states these communications were made for the purpose of rendering professional legal services the city and these communications were intended to be and have remained confidential. Based upon these representations and our review, we find the city demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the information subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code 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 city claims the remaining responsive information consists of communications between city attorneys, city employees, city-retained legal counsel, and other privileged parties that were made in furtherance of the rendition of professional legal services to the city. The city also states these communications were not intended for third parties, and the confidentiality of these communications have been maintained. Based upon these representations and our review, we find some of the information at issue consists of privileged attorney-client communications. Accordingly, the city may generally withhold the remaining responsive information under section 552.107(1) of the Government Code. However, we note one of these otherwise privileged e-mail strings includes an e-mail sent from a non-privileged party. Furthermore, if this e-mail is removed from the otherwise privileged e-mail string and stands alone, it is responsive to the instant request. Therefore, if the city maintains the non-privileged e-mail, which we marked, separate and apart from the otherwise privileged

e-mail string in which it appears, then this non-privileged e-mail is not excepted under section 552.107(1) of the Government Code, and the city may not withhold it on that basis.

In summary, Exhibit 3 and the e-mails containing the e-mail address excluded in the request are not responsive request for information, and the city is not required to release that information in response to the request. The city may withhold the information subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. The city may generally withhold the remaining responsive information under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mail we marked if the city maintains it separate and apart from the otherwise privileged communications.

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,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/be

Ref: ID# 778338

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: 1 Third Party
(w/o enclosures)