



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 21, 2019

Ms. Sandra Passailaigue
City Secretary
City of Leon Valley
6400 El Verde Road
Leon Valley, Texas 78238

OR2019-23231

Dear Ms. Passailaigue:

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# 781710 (ORR# 052419-A).

The City of Leon Valley (the "city") received a request for all correspondence between a named individual and the city during a certain time period, including all contracts, documents, and e-mails related to a specified investigation by a named law firm and bank documentation between the city and the named individual.¹ You state the city will release some information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor seeks "tangible and non-tangible items" relating to his request. The Act applies to "public information," which is defined in section 552.002 of the Government Code. Section 552.002 provides, in pertinent part, the following:

¹You state, and provide documentation demonstrating, the city sought and 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).

(a) In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). This office has ruled tangible physical items are not “information,” as that term is contemplated under the Act. *See* Open Records Decision No. 581 (1990). Thus, tangible items are not public information for purposes of section 552.002 of the Government Code, and the Act does not require the city to make tangible items available to the requestor. *See* Gov’t Code § 552.021.

Next, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was created outside the time period specified by the requestor, was created after the date the city received the instant request for information, or does not consist of correspondence involving the named individual. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). 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 such information in response to this request.

In addition, we note some of the responsive information may have been the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2019-21534 (2019). In that ruling, we determined: (1) the city may withhold the submitted information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503; (2) the city may generally withhold the remaining information under section 552.107(1) of the Government Code; however, the city may not withhold the marked non-privileged e-mails if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear; and (3) in releasing the non-privileged e-mails, the city must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its

disclosure. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the responsive information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2019-21534 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. *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). To the extent the responsive information is not encompassed by the previous ruling, we will address the applicability of the Act to the remaining responsive information.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in part:

(a) 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:

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

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (16), (17). A portion of the responsive information consists of completed reports subject to section 552.022(a)(1) of the Government Code. The city must release the information at issue pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *Id.* § 552.022(a)(1). The responsive information also includes attorney fee bills subject to section 552.022(a)(16) of the Government Code and court-filed documents subject to section 552.022(a)(17) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *Id.* § 552.022(a)(16), (17). Although you seek to withhold the information at issue under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions

generally); 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the city may not withhold the information at issue under section 552.107 of the Government Code. 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 assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022 of the Government Code. We will also consider your argument under section 552.107 for the information not subject to section 552.022.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the responsive information not subject to section 552.022 of the Government Code consists of communications between outside counsel for the city, city employees, and city officials that were made for the purpose of facilitating the rendition of professional legal services to the city. You indicate these communications were intended to be

confidential and have remained confidential. Based on your representations and our review, we find some of the responsive information not subject to section 552.022 consists of privileged attorney-client communications. However, upon review, we find the remaining information at issue consists of e-mail communications involving individuals you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish this information constitutes communications between privileged parties for the purposes of section 552.107(1). Thus, the city may not withhold the information we marked for release under section 552.107(1). Therefore, with the exception of the information we marked for release, the city may withhold the responsive information not subject to section 552.022 of the Government Code under section 552.107 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”² Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation. Id.* at 683.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in the *Ellen* decision contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused. However, the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

The remaining responsive information contains an investigation into alleged incidents of sexual harassment. Upon review, we determine the information at issue contains an adequate summary pertaining to the investigation of alleged sexual harassment, as well as the statement of the accused. Thus, the adequate summary and statement of the accused are not confidential under the doctrine of common-law privacy. However, information within the statement of the accused identifying the victims, along with additional information in Exhibit C relating to the investigation of alleged sexual harassment, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Therefore, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

Next, we address your argument under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022 of the Government Code. The elements of the privilege under rule 503 of the Texas Rules of Evidence are the same as those discussed above for section 552.107(1) of the Government Code. 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. Rule 503 of the Texas Rules of Evidence 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.

You seek to withhold the submitted attorney fee bills in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See Gov’t Code* § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decision Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). Accordingly, the city may not withhold the submitted fee bills in their entirety under Texas Rule of Evidence 503.

You assert the information at issue consists of privileged attorney-client communications. You represent the information subject to section 552.022 of the Government Code consists of communications between outside counsel for the city, city employees, and city officials that were made for the purpose of facilitating the rendition of professional legal services to the city. Further, you state the communications at issue were intended to be and have remained confidential. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney

for purpose of providing legal services and advice). Accordingly, the city may withhold the completed reports, including the adequate summary; the court-filed documents; and the information we marked within the attorney fee bills under rule 503 of the Texas Rules of Evidence. However, the remaining information in the attorney fee bills either does not document communications for purposes of rule 503 or documents communications with non-privileged parties. We note an entry stating a memorandum or e-mail was prepared, drafted, or reviewed does not demonstrate the document was communicated to the client. Thus, we find you failed to demonstrate the remaining information in the attorney fee bills consists of privileged attorney-client communications. Accordingly, the city may not withhold the remaining information in the attorney fee bills under Texas Rule of Evidence 503.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the city must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

In summary, 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 such information in response to this request. To the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2019-21534 as a previous determination and withhold or release the

identical information at issue in accordance with that ruling. With the exception of the information we marked for release, the city may withhold the responsive information not subject to section 552.022 of the Government Code under section 552.107 of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The city may withhold the completed reports, including the adequate summary; the court-filed documents; and the information we marked within the attorney fee bills under rule 503 of the Texas Rules of Evidence. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. The city must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure. The city must release the remaining responsive 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Deborah Southerland
Attorney
Open Records Division

DS/jxd

Ref: ID# 781710

Enc. Submitted documents

c: Requestor
(w/o enclosures)