



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 8, 2019

Ms. Marie N. Johnson
Counsel for the City of Pilot Point
Messer, Fort, & McDonald
6371 Preston Road, Suite 200
Frisco, Texas 75034

OR2019-31562

Dear Ms. Johnson:

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# 796142 (ORR ID: PP082019DL, PP082719AL).

The City of Pilot Point (the "city"), which you represent, received three requests from two requestors for specified reports and fee bills. You state the city does not maintain information responsive to a portion of the request.¹ You also claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-26846 (2019). We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the city may rely on Open Records Letter No. 2019-26846 as a previous determination and withhold or release the identical

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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).

information 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we address the first requestor's claim the city failed to comply with section 552.301 of the Government Code in requesting a ruling from this office. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Pursuant to section 552.301(d) of the Government Code, a governmental body must, within ten business days of receiving the request for information, provide the requestor with (1) a written statement the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d). You inform us the city was closed on September 2, 2019. We note the city's ten-business-day deadlines for purposes of sections 552.301(b) and 552.301(d) were September 4, 2019 for the first request received on August 20, 2019 and September 11, 2019 for the second request received on August 27, 2019. However, the information required by section 552.301(d) was hand-delivered to the first requestor on September 5, 2019. Thus, we conclude the city failed to comply with section 552.301(d) of the Government Code regarding the first request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1982). We note the information responsive to the first request is also responsive to the second request. You claim sections 552.101, 552.103, and 552.107 of the Government Code for the information responsive to the first and second requests. Because sections 552.101 and 552.107 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these exceptions for the information responsive to the first and second requests. We also note section 552.136 of the Government Code can provide a compelling reason to overcome the presumption of openness.² Therefore, we will address the applicability of this section to the information responsive to the first and second requests. We will also address your

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

claims for the information responsive to the third request. However, you have failed to demonstrate a compelling reason to address your claim under section 552.103. Consequently, the city may not withhold any portion of the information at issue under section 552.103 of the Government Code for the first and second requests.

Next, we note the submitted 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;

...

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

Gov't Code § 552.022(a)(1), (16). The submitted information consists of a completed investigation that is subject to section 552.022(a)(1) and attorney fee bills that are subject to section 552.022(a)(16). The information subject to section 552.022(a)(1) 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.* The information subject to section 552.022(a)(16) must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the submitted information under section 552.107 of the Government Code, and the attorney fee bills, which are responsive to the third request, under section 552.103 of the Government Code. However, these are discretionary exceptions 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); *see also* 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). Thus, the city may not withhold the information subject to section 552.022(a) under section 552.103 or 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. *See 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 submitted information. Additionally, because sections 552.101 and 552.136 of the Government Code can make information confidential under the Act, we will address the applicability of these sections to the submitted information.

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).

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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert some of the information at issue consists of privileged attorney-client communications. You represent the information at issue consists of communications between outside counsel for the city, the city attorney, 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 investigation, which we have marked, and the information we marked within the attorney fee bills under rule 503 of the Texas Rules of Evidence.³ 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 552.136 of the Government Code provides, “Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); see *id.* § 552.136(a) (defining “access device”). Accordingly, the city must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code.

In summary, the city may withhold the completed investigation, which we have marked, and the information we marked within the attorney fee bills under rule 503 of the Texas Rules of Evidence. The city must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code. The city must release the remaining information.

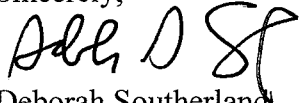
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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 <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

³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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,

A handwritten signature in black ink, appearing to read "Deborah Southerland". The signature is stylized and cursive.

Deborah Southerland
Attorney
Open Records Division

DS/jxd

Ref: ID# 796142

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)