



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 8, 2020

Ms. Linda Pemberton
Paralegal
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2020-00691

Dear Ms. Pemberton:

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# 805333 (ID# W030271).

The City of Killeen (the "city") received a request for information pertaining to a specified municipal utility district. You state the city will release some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

¹ Although you raise section 552.101 of the Government Code in conjunction with common-law privacy for the submitted information, you provide no arguments explaining how this doctrine applies to the information at issue. Therefore, we assume you no longer asserts this doctrine. See Gov't Code §§ 552.301, .302.

Gov't Code § 552.022(a)(3). A portion of the submitted information consists of information in an account, voucher, or contract relating to the expenditure of funds by a governmental body, which is subject to section 552.022(a)(3). *Id.* Thus, the city must release this information unless it is made confidential under the Act or other law. *See id.* 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 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).* Accordingly, the city may not withhold the information subject to section 552.022 of the Government Code under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for purposes of section 552.022(a). *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also address your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides:

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).

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

You state the information subject to section 552.022 consists of an attachment to a communication between attorneys for the city and city employees that were made for the purpose of providing legal services to the city. You state the communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find the information subject to section 552.022 of the Government Code consists of a privileged attorney-client communication the city may generally withhold under section Texas Rule of Evidence 503. We note, however, the attachment at issue was received from a non-privileged party. Furthermore, if the attachment received from a non-privileged party is removed from the otherwise privileged communication to which it is attached and stands alone, it is responsive to the request for information. Therefore, if this non-privileged attachment is maintained by the city separate and apart from the otherwise privileged communication to which it is attached, then the city may not withhold this non-privileged attachment under Texas Rule of Evidence 503.

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 information other statutes make confidential. Section 551.071 of the Government Code permits a governmental body to consult with its attorney in a closed meeting. *Id.* § 551.071. You assert Attachment D is confidential under section 551.071 of the Government Code. However, this provision does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 551.071 of the Government Code.

Section 552.101 of the Government Code encompasses section 551.104 of the Government Code which provides, in part, “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” Gov’t Code § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1998). Likewise, this office has determined minutes of a closed meeting are confidential. *See* Open Records Decision No. 60 (1974)

(closed meeting minutes are confidential under predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under Open Meetings Act), 495 (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). You state a portion of the submitted information consists of the written minutes of a closed meeting. Based on your representations, we agree the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. However, we note the remaining information at issue does not constitute a certified agenda or tape recording of a closed meeting. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

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

You state some of the remaining information consists of communications between attorneys for the city and city employees that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Therefore, the city may generally withhold the information we marked under section 552.107(1) of the Government Code. However, we note one of the 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. Accordingly, 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. Further, we find you have failed to demonstrate any of the remaining information constitutes communications between privileged parties made in furtherance of the rendition of professional legal services to the city for the purposes of section 552.107(1) of the Government Code. Therefore, the city may not withhold the information we marked for release on that basis.

In summary, the city may generally withhold the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503; however, if this non-privileged attachment is maintained by the city separate and apart from the otherwise privileged communication to which it is attached, then the city may not withhold this non-privileged attachment under Texas Rule of Evidence 503. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. The city may generally withhold the information we

marked under section 552.107(1) of the Government Code; however, the city may not withhold the non-privileged e-mail we marked if it is maintained separate and apart from the otherwise privileged e-mail string in which it appears. 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 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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/rm

Ref: ID# 805333

Enc. Submitted documents

c: Requestor
(w/o enclosures)