



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 15, 2020

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

OR2020-01521

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# 806626 (GC No. 26278).

The City of Houston (the "city") received a request for communications sent and received by a named employee which contain specified keywords. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-34651 (2019). In that ruling, we determined the city may withhold the information we marked under section 552.111 of the Government Code and must release the remaining information. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure

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

under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although the city seeks to withhold the information at issue under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure and do not prohibit the release of information or 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 now withhold the information that was previously released in Open Records Letter No. 2019-34651 under section 552.107 or section 552.111 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the city must continue to rely on Open Records Letter No. 2019-34651 as a previous determination and withhold or release the information we marked in accordance with that ruling.<sup>2</sup> *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). However, we will address your arguments against disclosure for the remaining information, which was not at issue in the previous ruling.

Next, we note some 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:

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

Gov't Code § 552.022(a)(1). A portion of the submitted information consists of a completed report subject to section 552.022(a)(1). The city must release the completed report 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. *See id.* 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). 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(a), as well as your claims against disclosure of the remaining information.

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<sup>2</sup>As we are able to make this determination, we need not address your arguments against disclosure of this 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).

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 city asserts the information subject to section 552.022 consists of an attachment to communications involving an attorney for the city and city employees in their capacities as clients. The city further states these communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these

communications have remained confidential. Based on these representations and our review, we find the city has established the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the city may generally withhold the information subject to section 552.022 under Texas Rule of Evidence 503. However, the information at issue consists of an attachment communicated to non-privileged parties. Furthermore, if the attachment communicated to the non-privileged parties is removed from the e-mail strings to which it is attached and stands alone, it is responsive to the request for information. Therefore, if the non-privileged attachment subject to section 552.022, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail strings to which it is attached, then the city may not withhold this non-privileged attachment under rule 503. Conversely, if this attachment does not exist separate and apart from the e-mail to which it is attached, the city may withhold it under Texas Rule of Evidence 503.

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. 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 DeShazo*, 922 S.W.2d at 923 (privilege extends to entire communication, including facts contained therein).

You state the information not subject to section 552.022 of the Government Code consists of communications between attorneys for the city and city employees that were made for the purpose of providing legal services to the city. The city also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may generally withhold the remaining information under section 552.107(1) of the Government Code. However, we note some of the e-mail strings at issue include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the city maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then it may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

In summary, the city must continue to rely on Open Records Letter No. 2019-34651 as a previous determination and withhold or release the information we marked in accordance with that ruling. The city may generally withhold the information we marked subject to section 552.022 under Texas Rule of Evidence 503. However, if the non-privileged attachment subject to section 552.022 is maintained by the city separate and apart from the otherwise privileged e-mail strings to which it is attached, then the city may not withhold this non-privileged attachment under rule 503. The city may generally withhold the remaining information under section 552.107(1) of the Government Code. However, if the

e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold this information under section 552.107(1).<sup>3</sup>

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,



Sean McCormick

Attorney

Open Records Division

SMC/eb

Ref: ID# 806626

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup> We note the information which may be released contains information to which the requestor has a right of access. See Gov't Code §§ 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles), .137(b); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). However, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public, under section 552.137 of the Government Code, without the necessity of requesting a decision from this office. Accordingly, if the city receives another request for this information from a different requestor, the city may withhold this information pursuant to Open Records Decision No. 684 without seeking another ruling from this office.