



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 6, 2020

Mr. Timothy B. Kirwin
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OR2020-12785

Dear Mr. Kirwin:

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# 826600.

The City of Missouri City (the "city"), which you represent, received a request for: (1) all performance evaluations, performance improvement plans, written complaints, and grievances for all legal staff during a stated time period, including e-mails discussing performance evaluations; (2) certain policies, directives, and training materials; (3) all contracts with outside legal counsel during a stated time period; (4) all salary and benefit information for all legal staff during a stated time period, including e-mails discussing salaries and benefits; (5) the requestor's personnel file; (6) the name, title, hire date, salary information, and benefits for certain staff members during a stated time period; (7) all communications sent to and from a named individual or certain staff members regarding the requestor during a stated time period; and (8) all e-mails sent between two named individuals during a stated time period.¹ You state the city will release some responsive information. You claim portions of the submitted information are excepted from disclosure

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

under sections 552.101, 552.107, 552.117, and 552.139 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of 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; [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). The submitted information includes a completed evaluation subject to section 552.022(a)(1), which we marked. 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.* § 552.022(a)(1). The remaining information includes 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), which we marked. The information subject to section 552.022(a)(3) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek 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 your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(3). Further, as sections 552.101 and 552.117 of the Government Code make information confidential under the Act, we will consider your arguments under these exceptions for the information at issue. We will also consider your 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(a) 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).

You state the information subject to section 552.022 of the Government Code consists of communications between city attorneys, outside counsel for the city, and city employees and officials that were made for the purpose of facilitating the rendition of professional

legal services to the city. You state these communications were intended to be confidential and have remained confidential. Upon review, we find you have established some of the information at issue constitutes privileged attorney-client communications under rule 503. Accordingly, with the city may withhold the information subject to section 552.022(a)(3) of the Government Code under rule 503 of the Texas Rules of Evidence. However, the completed evaluation subject to section 552.022(a)(1) was obtained from the requestor, a non-privileged party at the time of the communication, and is attached to an otherwise privileged e-mail string. Upon review, we find the evaluation is separately responsive to the request and exists separate and apart from the otherwise privileged communication to which it is attached. Thus, we find you have not demonstrated this information, standing alone, is a privileged attorney-client communication. Therefore, we find the city may not withhold the completed evaluation subject to section 552.022(a)(1) 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 are the same as those discussed for Texas Rule of Evidence 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 the information at issue consists of communications between city attorneys, outside counsel for the city, and city employees and officials that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find you demonstrated the applicability of the attorney-client privilege to the communications at issue. Accordingly, the city may generally withhold the information you indicated and we marked under section 552.107(1) of the Government Code.² However, we note some of these otherwise privileged e-mail strings include e-mails and attachments received from or sent to a non-privileged parties. Furthermore, if these e-mails and attachments are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the city maintains these non-privileged e-mails and attachments, which we marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails and attachments are not excepted under section 552.107(1), and the city may not withhold them on that basis.

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.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, information pertaining to leave of public employees is generally a matter of legitimate public interest. *See* Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private). Upon review, we find you failed to demonstrate the information at issue is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees or officials of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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. Accordingly, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

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).³ Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the e-mail addresses in the remaining information belong to city employees or officials or fall within the scope of section 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses at issue belong to employees or officials of the city or to the extent subsection (c) applies, the e-mail addresses may not be withheld under section 552.137 of the Government Code. However, to the extent the e-mail addresses at issue are not the personal e-mail addresses of employees or officials of the city and subsection (c) does not apply, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b).

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Id. § 552.139(a). Section 2059.055 of the Government Code provides, in relevant part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity[.]

Id. § 2059.055(b). You state the information you marked and indicated is related to computer security, infrastructure, or passwords. Based upon your arguments and our review of the information, we find some of the information at issue, which we marked, relates to computer network security. Accordingly, the city must withhold the information we marked under section 552.139 of the Government Code. However, we find you failed to demonstrate any of the remaining information relates to computer network security, to restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Therefore, none of the remaining information may be withheld under section 552.139 of the Government Code.

³ 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).

In summary, the city may withhold the information subject to section 552.022(a)(3) of the Government Code under rule 503 of the Texas Rules of Evidence. The city may withhold the information you indicated and we marked under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mails and attachments we marked if the city maintains them separate and apart from the otherwise privileged communications. If the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code. To the extent the e-mail addresses at issue are not the personal e-mail addresses of employees or officials of the city and subsection (c) does not apply, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The city must withhold the information we marked under section 552.139 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 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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/gw

Ref: ID# 826600

Enc. Submitted documents

c: Requestor
(w/o enclosures)